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ABSTRACT

This compendium provides an overview of selected codes of student conduct, a selection of annotated legal decisions and important law review articles, and various National Association of College and University Attorney (NACUA) outlines on the issue of student discipline in both academic and nonacademic contexts. Part 1 lists nonacademic codes of student conduct and discipline procedures from Princeton University (New Jersey), California State University, University of Iowa, City University of New York, University of Wisconsin, Colgate University (New York), and the University of New Mexico. Part 2 presents academic codes and policies from the University of Wisconsin, Colgate University (New York), Florida State University, and Rutgers--The State University of New Jersey. Part 3 contains summaries of legal decisions in seven cases from the period 1994-97. Issues include disclosure of student disciplinary records, procedural due process, failure to afford a pre-termination hearing, breach of contractual duty to inform, discrimination in dismissal, and procedural elements in disciplinary dismissal. Part 4 presents selected law review and legal periodicals articles; issues include due process rights in student disciplinary matters, students' rights to counsel, judicial responses to adverse academic decisions, academic honor codes, campus due process and student disciplinary rules, protecting student disciplinary codes from due process challenges, employee and student handbooks, university liability, supervising students (in loco parentis), consensual sexual relations between faculty and students, colleges and student athletes, and case studies of campus ethics. Section 5 offers selected NACUA conference outlines. A list of nine additional sources is included. (BF)

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NACUA

THE PUBLICATION SERIES

# Student Disciplinary Issues: A Legal Compendium

## SECOND EDITION

EDITED BY
VALERIE L. BROWN

National Association of College and University Attorneys

HE 031 027

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# Student Disciplinary Issues:
# A Legal Compendium

## Second Edition

Edited by
Valerie L. Brown, Esq.

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National Association of College and University Attorneys
1997

**Valerie L. Brown** is Legislative Counsel for the New Jersey Bar Association. She is a graduate of Howard University School of Law, and holds a Master's degree in Political Science from Miami University (Ohio) and a Bachelor's Degree from John Jay College of Criminal Justice (New York). She previously served as Associate Director for Policy Research for the New Jersey State College Governing Boards Association. Ms. Brown is a member of the American Bar Association, American Society of Association Executives, and the National Association of Bar Executives. She serves on the Editorial Board of the *West Education Law Reporter* for which she has authored numerous articles, including a commentary on "hate speech" and drug testing of student athletes. Ms. Brown is a member of the New Jersey and Pennsylvania Bars.

Users of this publication are reminded that the information given here is general in nature and is not in any manner intended as legal advice. Legal counsel should be consulted concerning the legal effects and ramifications of specific actions, questions, and situations.

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# Editor's Note

The National Association of College and University Attorneys (NACUA) continues its dedication to provide the higher education community with research and cutting-edge information through the re-publication of *Student Disciplinary Issues: A Legal Compendium,* updated from its earlier 1993 publication.

The compendium provides an overview of selected codes of student conduct, a sampling of annotated legal decisions, important law review articles, and various NACUA outlines on the issue of student discipline in both the academic and non-academic context. Though some of the legal articles are a decade old, they continue to reflect the status of the law and are excellent resources for the layperson, as well as for counsel. A listing of additional resources is included to assist readers in conducting further research. Although I had hoped to include Edward N. Stoner III's revised seminal work on model student disciplinary codes, at this time, it is is still not yet available. Plans call for it to be published in *The Journal of College and University Law* later this year or early in 1998.

Student disciplinary issues have become a fertile ground for litigation during the past several years. Colleges and universities -- both public and private -- continue to exercise the right to discipline students for academic and nonacademic misconduct. However, courts throughout the United States have greatly scrutinized the procedural protections afforded higher education students.

Questions arise regarding the level of procedural due process that institutions must provide to students in an academic and disciplinary context. Is there a need for a pre-termination hearing? Are colleges and universities required to provide procedures that mirror federal and state constitutional protections in disciplinary matters? These and other issues are addressed.

I hope the compendium will provide guidance to college and university administrators as they confront issues of due process, legal notice, liability, student rights and responsibilities, and college and university liability.

On behalf of NACUA, I wish to acknowledge the following persons: Linda Henderson and the Summer 1997 Law Clerks of NACUA; Pat Lucisano and Sue DeBonis for their secretarial assistance, and Harold Rubenstein of the New Jersey State Bar Association for his support.

Your comments are welcome.

Valerie L. Brown, Esquire
Editor
September 1997

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5. University of Wisconsin System
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# PRINCETON UNIVERSITY

## I. University-Wide Regulations

## University Principles of General Conduct and Regulations

### INTRODUCTION

The central purposes of a University are the pursuit of truth, the discovery of new knowledge through scholarship and research, the teaching and general development of students, and the transmission of knowledge and learning to society at large. Free inquiry and free expression within the academic community are indispensable to the achievement of these goals. The freedom to teach and to learn depends upon the creation of appropriate conditions and opportunities on the campus as a whole as well as in classrooms and lecture halls. All members of the academic community share the responsibility for securing and sustaining the general conditions conducive to this freedom.

The primary purposes of regulations and discipline in a university are to protect the well-being of the community and to advance its educational mission by defining and establishing certain norms of behavior. At Princeton, disciplinary proceedings have a role that is subordinate to positive guidance, rational admonition, and reasonable appeal to members of the University to observe its stated norms. The disciplinary system establishes procedures for a fair hearing, including advising a person fully of the charges against him or her, affording him or her ample opportunity to speak on his or her behalf, and requiring a clear explanation of his or her rights of appeal. Disciplinary proceedings are instituted only for violations of standards of conduct defined in advance and published, or for actions that can be reasonably deduced as violations in light of those specifically defined as such. Regulations governing the conduct of members of the University community will be revised only after deliberations in which representatives of the appropriate groups are invited to participate.

Since rigid codification and relentless administration of rules and regulations are not appropriate to an academic community, the rules and policy statements that follow serve mainly to clarify commonly accepted standards of conduct within the University.

### ACADEMIC INTEGRITY

The ability of the University to achieve its purposes depends upon the quality and integrity of the academic work that its faculty, staff and students perform. Academic freedom can flourish only in a community of scholars which recognizes that intellectual integrity, with its accompanying rights and responsibilities, lies at the heart of its mission. Observing basic honesty in one's work, words, ideas, and actions is a principle to which all members of the community are required to subscribe.

## HONESTY IN UNIVERSITY MATTERS

Members of the University Community are expected to be honest and straightforward in their official dealings with University processes, activities and personnel. This obligation includes honoring contracts and agreements and providing accurate information on official forms and documents as well as to official University personnel, offices and committees. Deliberate violations of this provision will be considered serious offenses; subsequent violations, or systematic violations in the first instance, will be considered extremely serious.

## CONFIDENTIALITY OF RECORDS

Any willful violation of the provisions of the Privacy Rights which appear under Student Privacy Rights under Federal Law, pages 78-80, will be regarded as an extremely serious offense.

## RANGE OF PENALTIES

For violations of University-wide rules of conduct, members of the community are subject to several kinds of penalties. The applicability and exact nature of each penalty vary for faculty, students, professional staff, and employees; but in general the penalties, in ascending order of severity, are:

### 1. Warning

A formal admonition that does not become part of an individual's permanent record, but that may be taken into account in judging the seriousness of any future violation.

### 2. Disciplinary Probation

A more serious admonition assigned for a definite amount of time, up to two years. It implies that any future violation, of *whatever kind,* during that time, may be grounds for suspension, required withdrawal, or in especially serious cases, for expulsion, from the University.

Disciplinary probation appears on an individual's permanent record at the University (but not on the transcript) and may be disclosed by the Office of the Dean of Student Life in response to requests for which the student has given permission.

***Campus Service.*** Campus Service up to 10 hours per week may be added to disciplinary probation for a portion of or the duration of the probationary period. This penalty may be particularly appropriate in cases involving vandalism, disorderly conduct and alcohol-related infractions.

***Relocation Within or Removal from University Housing.*** When appropriate to the infraction, particularly in instances involving anti-social behavior having a serious impact on the residential community, removal from University housing or relocation within University housing may be added to disciplinary probation for a portion of or the duration of the probationary period. In the case of a first year student or a sophomore, this penalty will be imposed only after consultation with the master of the student's residential college. The dining contract will not necessarily be revoked.

### 3. Withholding of Degree

In cases involving seniors, the University may withhold a student's Princeton degree for a specified period of time. Often, this penalty is imposed instead of suspension. In such a case, the student may be permitted to remain on campus to complete his or her academic requirements for the degree.

### 4. Suspension

Removal from membership in, or employment by, the University for a specified period of time.

### 5. Required Withdrawal

Removal from membership in, or employment by, the University for at least the period of time specified by the suspension, with the suspension to continue until certain conditions, stipulated by the appropriate body applying this sanction, have been fulfilled. These conditions may include restitution of damages, formal apology, or counseling.

### 6. Expulsion

Permanent removal from membership in, or employment by, the University, without hope of readmission to the community. For members of the faculty, expulsion may involve revocation of tenure.

### 7. Censure

University censure can be added to any of the other penalties listed above, except warning. Censure indicates the University's desire to underscore the seriousness of the violation and the absence of mitigating circumstances and to convey that seriousness in response to future authorized inquiries about the given individual's conduct or character.

In circumstances seriously affecting the health or well-being of any person, or where physical safety is seriously threatened, or where the ability of the University to carry out its essential operations is seriously threatened, or impaired, the President or his representative, a senior officer of the University authorized by him, may summarily suspend, dismiss or bar any person from the University. In all such cases, actions taken are subject to reasonably prompt subsequent review by regular University processes or authorities. If a review process is not otherwise specified, the Provost will act in this capacity if requested to do so.

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# University-Wide Conduct Regulations

## RESPECT FOR OTHERS

Respect for the rights, privileges, and sensibilities of each other is essential in preserving the spirit of community at Princeton. Actions which make the atmosphere intimidating, threatening, or hostile to individuals are therefore regarded as serious offenses. Abusive or harassing behavior, verbal or physical, which demeans, intimidates, threatens, or injures another because of his or her personal characteristics or beliefs is subject to University disciplinary sanctions as described above. Examples of personal characteristics or beliefs include but are not limited to sex, sexual orientation, race, ethnicity, national origin, religion, and handicap. Making tolerance of such behavior or submission to it a condition of employment, evaluation, compensation, or advancement is an especially serious offense. Procedures for resolving complaints or grievances on such matters are discussed on pages 17-20.

Princeton University strives to be an intellectual and residential community in which all members can participate fully and equally, in an atmosphere free from all manifestations of bias and from all forms of harassment, exploitation, or intimidation. As an intellectual community, it attaches great value to freedom of expression and vigorous debate, but it also attaches great importance to mutual respect, and it deplores expressions of hatred directed against any individual or group. The University seeks to promote the full inclusion of all members and groups in every aspect of University life.

### Racial or Ethnic Bias and Harassment

Mutual respect requires special sensitivity to issues of race and ethnicity.

Expressions of racial or ethnic bias directed at individuals or groups undermine the civility and sense of community on which the well-being of the University depends. They devalue the distinctive contributions of the individuals affected and impair their ability to contribute their views and talents to the community and to benefit fully from participating in it. By alienating those individuals, they harm the whole community. The University calls on all its members to display the appropriate sensitivity and to challenge expressions of racial or ethnic bias whenever they encounter them.

The University is seriously committed to disciplinary action against racial or ethnic harassment, as defined in "Respect for Others," above. Procedures for resolving complaints or grievances relating particularly to racial or ethnic harassment are described on page 19.

### Sexual Harassment and Assault

Every member of the University community should be aware that the University is strongly opposed to sexual harassment and assault and that such behavior is prohibited both by federal and state law and by University policy. It is the intention of the University to take whatever action may be needed to prevent, correct, and if necessary, discipline behavior that violates this policy.

***Definition of Sexual Harassment.*** Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

1. Submission to or rejection of such conduct is made implicitly or explicitly a term or condition of instruction, employment, or participation in other University activity;
2. Submission to or rejection of such conduct by an individual is used as a basis for evaluation in making academic or personnel decisions affecting an individual; or
3. Such verbal or physical conduct has the effect of unreasonably interfering with an individual's work, academic performance, or living conditions by creating an intimidating, hostile, or offensive environment.

***Definition of Sexual Assault.*** Princeton University defines sexual assault (including but not limited to rape) as committing any of the following acts:

1. Any sexual physical contact that involves the use or threat of force or violence or any other form of coercion or intimidation;
2. Any sexual physical contact with a person who is unable to consent due to incapacity or impairment, mental or physical. "Incapacity" or "impairment" normally includes but is not limited to being asleep or under the influence of alcohol or drugs.
3. The University defines rape as sexual assault involving an act of penetration and considers it to be an especially serious offense. Sexual assault includes both "stranger rape" and "acquaintance rape" (in which the assailant and victim know each other).

All forms of sexual assault and all attempts to commit such acts are regarded as serious University offenses which are likely to result in suspension, required withdrawal, or expulsion. New Jersey criminal law encompasses the offenses identified above, and prosecution may take place independently of charges under University regulations. Convictions under New Jersey law can result in imprisonment for up to 20 years; see "The University and the Law" (page 7).

In determining whether the alleged conduct constitutes sexual harassment or assault, consideration will be given to the totality of circumstances involved in the incident, including the nature of the sexual conduct and the context in which the alleged incident occurred. Procedures for resolving complaints or grievances relating particularly to sexual harassment and assault are described on page 19. Details of University procedures for responding to complaints, including an explicit listing of victim's rights, can be obtained from the Offices of: SHARE (McCosh Health Center), the Dean of Student Life (West College), the Dean of the Graduate School (Nassau Hall), the Dean of the Faculty (Nassau Hall), and the Vice President for Human Services (Clio Hall).

## PROTESTS AND DEMONSTRATIONS

Free speech and peaceable assembly are basic requirements of the University as a center for free inquiry and the search for knowledge and insight. These rights involve a concurrent obligation on the part of all members of the University to maintain on the campus an atmosphere conducive to scholarly pursuits and to respect the rights of all individuals.

Demonstrations and the distribution of leaflets, statements, or petitions, therefore, are permitted on the campus unless, or until, they disrupt regular and essential operations of the University or significantly infringe on the rights of others. On the same grounds, the campus is open to speakers whom students, faculty, or staff wish to hear, and to recruiters for agencies and organizations in whom students or faculty have an interest.

1. It is a *violation* of these policies for a member of the faculty, staff, or student body (a) to prevent, or willfully attempt to prevent, the orderly conduct of a University function or activity, such as lectures, meetings, interviews, ceremonies, and public events; (b) to block, or willfully attempt to block, the legitimate activities of any person on the campus or in any University building or facility. Violations of this provision, if persisted in after due warning, will be regarded as serious offenses.

2. Officers of the University (see Bylaws of the Board of Trustees) retain the right to take whatever legal actions they may deem necessary against violators of these provisions. Members of the press are fully subject to these provisions unless special arrangements for press coverage have been authorized by the responsible University official. Ordinarily, arrangements of some kind to permit press coverage will be made when circumstances allow, and will be administered by the University's Office of Communications.

## DISTRIBUTION OF WRITTEN MATERIAL BY MEMBERS OF THE UNIVERSITY

The University requires that the identity and telephone number of the sponsoring organization or individual be included in any written material (e.g., petitions, posters, and leaflets) distributed on campus by a member of the University.

## PERSONAL SAFETY

Actions that threaten or endanger in any way the personal safety or security of others will be regarded as serious offenses. The following offenses will be regarded as extremely serious:

1. Deliberate participation in a riot or general disturbance that threatens the safety, or seriously threatens the property, of either University members or townspeople.
2. Intimidation by violence, by a threat of violence, or by property damage, which seeks to interfere with the free expression of ideas, or attempts to punish such free expression.
3. The possession, storing, or use on campus of firearms or ammunition, or of any explosive or incendiary device (including firecrackers and other fireworks) that might threaten human life, except inoperative antique firearms used exclusively for decorative purposes. (Usable firearms may be stored for short periods of time in the Department of Public Safety, Stanhope Hall, to be checked out for authorized legal use.)
4. The use or threatened use of weapons or objects capable of being used as weapons.

5. Any physical assault committed in the course of any University function or activity, or on the premises of the University.

6. Any other act that seriously endangers human life, or threatens serious physical or psychological injury.

## QUIET

Activities that take place in the vicinity of University residences, classrooms, the library, the chapel, and similar facilities must be conducted in such a way as to respect the necessity for maintaining a reasonable degree of quiet in such areas.

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# II. Students and the University

## Rights and Responsibilities of Students

The following statement is excerpted from a longer document adopted by the faculty, October 7, 1968, to clarify the rights and responsibilities of students in the University.

The purpose of this statement is to affirm those basic principles that underlie, and to state those policies and procedures that define, the rights and responsibilities of the student in the University. These principles hold with equal force for undergraduate and graduate students, although their application may lead to different administrative arrangements reflecting differences in these two groups.

As constituents of the academic community, students are expected, individually and collectively, to express their views on issues on institutional policy and on matters of general interest to the student body. As expressed through informal consultation with the president, other officers of the University, and members of the faculty, student views are especially valuable and will always play an essential role in the formulation of policies affecting student interests. These officers of the University are also available to discuss any matters of importance with any student organization. In addition to these important channels of communication it now seems appropriate to provide other means through which students can make useful contributions to decisions that are of special interest and relevance to their academic, cultural, and social life at Princeton.

Several purposes are served by student participation in processes by which decisions are reached in the University. Their assessment of academic needs and interests and their suggestions for strengthening the academic program contribute to the continuing efforts of the trustees, administration, and faculty to improve the effectiveness of a Princeton education. By drawing on the ideas and talents of students to a greater extent, the cultural and intellectual life of the campus outside the classroom can be stimulated and these activities made more responsive to their perceived needs. And although students now bear substantial responsibility for determining and applying rules or social conduct, there is reason to believe that they can make further contributions that will enhance the conditions of individual and social life at Princeton. Finally, the availability to students of wider opportunities for sharing in appropriate decision-making functions will have a significant educational value in enlisting their mature and responsible attention to problems that necessarily have counterparts in the wider world community. For these several reasons, the University community will continue to seek clearly defined means for the student body to participate in the formulation and application of institutional policy affecting academic and student affairs.

## FACULTY PROCEDURES OF CONCERN TO STUDENTS

The following paragraphs are excerpted from *Rules and Procedures of the Faculty*, 1993.

### Evaluation of Quality of Instruction of Departments and Individual Members of the Faculty

Each year departmental chairmen shall invite interested students and the student departmental committees to express their views on the range, balance, and quality of instruction in their departments and on other matters relevant to the reappointment and advancement of faculty members, and shall advise the students and these committees that they may forward to the Dean of the Faculty for transmission to the President (and, where appropriate, to the Faculty Advisory Committee on Appointments and Advancements) comments regarding the quality of teaching by individual members of the faculty.

### Attendance at Faculty Meetings

Meetings of the faculty shall normally be open for attendance as observers to representatives of the campus press, to members of the Executive Committee of the Undergraduate Student Government, to members of the Council of the Princeton University Community, to the Officers of the Corporation, to the Associate and Assistant Deans of the Faculty, of the Graduate School, of the College, and of Students. Observers shall not attempt by word or deed to influence the proceedings. Meetings may be broadcast on campus radio, subject to the conditions of confidentiality as specified below. Members of University or faculty committees who have been invited to appear in connection with a committee report and other guests who have been invited by the President shall normally be free to remain during the whole session to which they have been invited. All in attendance shall be bound to preserve the confidentiality of any portion of a meeting that has been declared closed to observers, in whole or in part, on the vote of a two-thirds majority of the Faculty Advisory Committee on Policy or on the request of one third of the members of the faculty present and voting.

### Faculty Reconsideration of Proposals Regarding Undergraduate Curriculum

The faculty shall consider a second vote on any action taken on a proposal regarding the undergraduate curriculum when a second vote has been requested by the Caucus of the Undergraduate Student Government. In any particular academic year, the faculty commits itself to a second vote on any action on a proposal regarding the undergraduate curriculum when, within 30 days exclusive of vacations after such action, a second vote has been requested by a two-thirds majority of the Caucus of the Undergraduate Student Government. In requesting reconsideration, the Caucus of the Undergraduate Student Government will normally ask that the Faculty Committee on the Course of Study, meeting jointly with the Academics Committee of the Undergraduate Student Government, review their proposal. The faculty would then reconsider its original action and any amendments or alternative proposals recommended. The Undergraduate Student Government may also return the proposal directly to the faculty, which may reconsider the proposal immediately or may request review of the proposal by the Committee on the Course of Study prior to reconsideration. If the action to be reconsidered is on a proposal that the faculty has rejected, a majority vote of the faculty shall reverse the previous decision. If the action to be reconsidered is on a proposal that has been adopted by the faculty, a two-thirds vote of the faculty shall be necessary to affirm the previous decision. The faculty shall not be requested to reconsider the same action more than once in any academic year.

### Interaction of Undergraduate Student Government Committees and Faculty Committees

Whenever the Undergraduate Student Government shall establish a committee parallel to a faculty committee, the parallel committees shall at least once a year meet in joint session. In addition, the chairman and one additional member of such committees of the Undergraduate Student Government shall meet with those faculty committees which the President of the University and the officers of the Undergraduate Student Government believe would benefit from such participation. The student representatives on faculty committees shall join freely in committee discussions of matters of concern to students, and shall be responsible for presenting the views of the student committee and the Undergraduate Student Government, when those views are known. Any student participating in the deliberations of a faculty committee is bound by the same rules as the faculty regarding the confidential nature of the proceedings. Within the bounds of this restriction, he or she may discuss the matters under consideration with the Undergraduate Student Government or with other students. Either committee may meet without the participation of members of the parallel committee. Before any final recommendation is made on any matter of general policy concerning students, there will be an opportunity for the student committee to meet jointly with the faculty committee involved. Views of the student committees may be brought to the attention of the full faculty and the University community.

### Individual Student Appeal from Decisions of Faculty Committees

A student desiring to appeal an action of a Faculty committee taken on academic grounds which affects directly his or her academic standing and for which appeal is not otherwise provided, should notify the Dean of the Faculty in writing to that effect, specifying the grounds of appeal. Notification must be made no later than seven days after receipt of the written notice of the decision which the student wishes to appeal. The Dean of the Faculty shall transmit the student's written statement and any other relevant material directly to the Advisory Committee on Policy.

In deciding appeals, The Advisory Committee on Policy will consider whether other committees have followed established procedures and reached decisions consistent with the University rules and practices. In all cases the decision of the Advisory Committee on Policy shall be final. If an appealed action is judged to have been arbitrary or based on improper or unfair procedures, the appeal will be sustained. In such a case the Advisory Committee on Policy will determine a course of action to insure an impartial final determination of the merits of the case based on proper and fair procedures.

## Coordination Between Faculty and Undergraduates on Matters Affecting Student Life

***The Undergraduate Life Committee.*** The Undergraduate Life Committee is concerned with fostering relationships among academic, residential, and social experiences of undergraduates and, more generally, with the tone and character of undergraduate student life. In conjunction with the Council of Masters, which oversees such matters in the residential colleges and Stevenson Hall, the Committee reviews policies affecting residential and extracurricular life for all undergraduates, giving particular attention to questions affecting juniors and seniors.

The Committee may advise the Dean of Student Life, the Dean of the College, and the President concerning matters under its purview and may, periodically, report and make recommendations to the faculty.

The Committee consists of six members of the faculty, including at least two who are nontenured; included in this number are one Residential College Master and the Master of Stevenson Hall. The following members of the administration also serve on the Committee: the Dean of Student Life (chair), the Dean of the College (or an Associate or Assistant Dean of the College), and the Chair of the Department of Athletics, Physical Education and Recreation; the Director of University Health Services; and an Associate Dean of Student Life, who serves as secretary.

Normally, the Committee will include in its deliberations, and in the work of any subcommittees which may develop, student members of the Undergraduate Life Committee of the Undergraduate Government.

***The Council of Masters.*** The Council of Masters is concerned with creating and maintaining an environment in the undergraduate residential colleges and Stevenson Hall which supports and enhances the educational mission of the University. In carrying out these responsibilities, the Council of Masters, after consulting with the college and hall council, sets policy for the residential and dining facilities for which it has general oversight and may advise the Dean of Student Life, the Dean of the College, and the President on matters of general concern. The Council works in conjunction with, and makes recommendations to, regular standing committees of the faculty, especially the Committee on the Course of Study and the Undergraduate Life Committee.

The masters of the five undergraduate residential colleges and of Stevenson Hall are normally appointed to four-year terms by the President on the recommendation of the Dean of the College and the Dean of Student Life. The members of the Council, in addition to the Masters, include the Dean of the College (Chair), the Dean of Student Life, and an Associate Dean of Student Life (or an Associate or Assistant Dean of the College), who serves as secretary.

## Undergraduate Departmental Committees

To make possible continuing contacts between the departmental chairs, faculty of the department, and students, an undergraduate departmental committee shall be established in each department.

1. In the election of student departmental committees, such committees and departmental chairs shall be jointly responsible for adopting procedures that have these objectives:

    a) It should be convenient for the students of the department to vote.

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b) There should be an opportunity for any departmental student to place names in nomination.

c) It should be easy for relatively small groups of students to have a representative on their department's committee and difficult for an organized minority to capture a disproportionate share of committee positions.

d) There should be reasonable precautions against multiple balloting and reasonable measures to ensure a fair count of the vote.

2. Student departmental committees shall be provided with a reasonable amount of secretarial assistance in preparing proposals, communicating with departmental majors, and conducting elections.

3. Departmental chairs shall be responsible for:

a) Referring all proposals for major changes in departmental undergraduate programs to their student committees before action on such proposals is taken by departmental faculties.

b) Inviting members of student committees to discuss proposals for major changes in departmental undergraduate programs with departmental faculties at or before any meetings in which departmental faculties take action on such proposals.

c) Scheduling at least two meetings each academic year with their student committees, one early in the fall term to work out plans for later consultation, and one in late spring to review departmental undergraduate offerings so that chairs may take student views into account in preparing requests for new staff.

4. Student committees and faculty departmental committees concerned with the undergraduate program (in departments in which the latter sort of committee exists) shall normally meet jointly.

5. Student departmental committees have the following additional rights:

a) The right to attach comments, favorable or unfavorable, to all proposals forwarded by the faculties of their departments to the Committee on the Course of Study.

b) The right in certain circumstances to secure a departmental faculty's reconsideration of action taken on proposals regarding the course of study for undergraduate students. Specifically: Departmental faculties should seriously consider a second vote on any measure regarding the department's undergraduate program, when a second vote is requested by the student committee of the department. In any particular academic year departmental faculties should commit themselves to a second vote on such measures if a second vote is requested within one month by the student committee in a petition endorsed by two thirds of the department's majors. If the action being reconsidered is on a proposal that the departmental faculty has rejected, a majority vote of the departmental faculty should reverse the previous decision. If the action being reconsidered is on a proposal that has been adopted by the departmental faculty, a two-thirds vote of the departmental faculty should be required to affirm the previous decision.

## UNDERGRADUATE STUDENT GOVERNMENT

The Undergraduate Student Government (USG) plays an important role in many areas of direct concern to undergraduates, including participating in the formulation of various University policies and the sponsorship of a wide variety of programs and activities. The USG encourages all undergraduates to call the USG Hotline at 258-3102 with any concerns they have about University policy.

**Purpose**

As stated in the Constitution of the USG, the purposes of the USG are:

1. to serve as the representative of the undergraduates of Princeton University to the faculty, administration, and trustees of the University;

2. to represent the undergraduates of Princeton University to persons or groups outside of the University whenever such representation is called for;
3. to exercise leadership in all activities affecting the life of the undergraduates of Princeton University;
4. to provide services for the University and members of the University community;
5. to discuss, deliberate, and vote on any question relating to or affecting undergraduate life at Princeton University, or any other question of interest to the undergraduates.

**The Student Senate**

All terms last for one year. The voting members of the Student Senate are as follows:

1. the President, Vice President, and Treasurer, elected in December;
2. the chairs of the Undergraduate Life Committee, Academics Committee, Social Committee, and Campus and Community Affairs Committee, elected in December;
3. the ten undergraduate members of the Council of the Princeton University Community, elected in April;
4. six Senators, two from three classes; first-years, sophomores, and juniors elect Senators in December.

**Committees of the Student Senate**

1. Members of the Undergraduate Life Committee meet monthly with the Dean of Student Life and the faculty Undergraduate Life Committee to review policies and make recommendations regarding nonacademic life.
2. The Academics Committee represents the undergraduates in matters of academic policy and offers academic-related services, such as the Student Course Guide, to the undergraduate student body.
3. The Social Committee sponsors a wide variety of social events for undergraduates. These activities include P-Party, Spring Fling, and a weekend shuttle to Market Fair Malls.
4. The Campus and Community Affairs Committee works to improve town-gown relations. The Committee also sponsors morning Breakfast Breaks held several times each semester in McCosh Courtyard.
5. The Projects Board makes grants and loans of over $15,000 each semester to University-recognized student organizations.

**Class Officers**

Each class elects in April a President, Vice President, Treasurer, Secretary, and Social Chair. They are mostly responsible for coordinating social and service activities for the class they represent.

**Referenda**

1. Methods of Calling a Referendum

a) *Referenda concurrent with USG elections.* Following a one-third vote of the Student Senate or upon petition of two hundred undergraduates, a referendum will be placed on the ballot of the nearest upcoming USG election.

b) *Referenda held during the rest of the year.* Within three weeks (excluding vacations) of a two-thirds vote of the Student Senate or receipt of a petition of five hundred undergraduates a referendum will be held. If a USG election occurs during the three week period, the referenda will be held concurrently with the election.

2. Any undergraduate wishing to petition for a referendum shall notify the USG Vice President of this intention. The USG Elections Committee shall determine the proper form for the referendum. Completed petitions must be submitted no later than four weeks after notification.

3. The Student Senate shall be bound by the result of the referendum if at least one-sixth of regularly enrolled undergraduates vote in the majority. If the proposal contained in the referendum amends the USG Constitution or the Projects Board Charter, then the amendment shall be considered adopted if three-fifths of those voting, including at least one-sixth of the regularly enrolled undergraduates, vote in the affirmative.

## CAMPUS ASSOCIATIONS AND ACTIVITIES

Students engaging in extracurricular activities on campus are free to form organizations devoted to a wide variety of objectives, and, as individuals or members of organizations, to express their views on issues of University and public interest. In these matters the University policy is to encourage free and responsible behavior of students, to hold to a minimum those regulations essential to the orderly conduct of extracurricular activities, and to seek in all ways to maintain the freedom enjoyed by students as participants in the life of the Princeton University community.

University recognition will not be withheld from any group pursuing lawful objectives merely because its aims may seem unorthodox. Student organizations may invite outside speakers of their choice, and are free to hold meetings and in other ways to express their views, subject only to prudent conditions regarding the protection of people and property and to reasonable regulations concerning time, place, and notice of meetings and other public exercises.

Demonstrations and the distribution of leaflets, statements, or petitions are permitted on the campus unless, or until, they disrupt the regular and essential operations of the University or significantly infringe upon the rights of others. If it becomes necessary to prevent a demonstration from exceeding these guidelines, the University will first attempt to use persuasion; the University will then, if necessary, use its own security personnel, and will call in outside law enforcement officials only as a last resort.

These policies are intended to safeguard the rights of students and student organizations to freedom of association. At the same time, candor and openness must be recognized as fundamental in an academic community, and the University does not look with favor on clandestine organizations. Furthermore, the activities of student organizations inevitably involve the University, which has, on occasion, been called upon to help to ensure that they meet financial and other obligations. For these several reasons, the University must ask student organizations which expect recognition by the University, identification through the use of the name of the University, and normal use of University facilities, to register the names of their officers and their basic objectives or purposes.

Upon filing a request with the appropriate University official, nonprofit and profit-making campus-based organizations will usually be granted permission to distribute literature, solicit donations, and seek customers on campus, subject to the general University regulations prohibiting obstruction of University activities or interference with individual rights. Authorization for such activities must be obtained from the Office of the Dean of Student Life in the case of buildings and grounds on the main campus; the Office of the Dean of the Graduate School in the case of the Graduate College; or the Office of the Director of the Plasma Physics Laboratory in the case of the buildings and grounds on the Forrestal Campus. Authorization to solicit in academic buildings or University offices will be granted only after consultation with the responsible academic and administrative officers. In the case of profit-making activities, regulations governing student agencies will apply.

Detailed guidelines for undergraduate organizations are available at the Office of the Dean of Student Life, 315 West College. Guidelines for graduate students are available from the Assistant Dean of the Graduate School, 302 Nassau Hall.

## STUDENT PUBLICATIONS

Student publications and broadcasting organizations are a valuable aid in establishing and maintaining an atmosphere of free and responsible discussion and of intellectual exploration on the campus. They are a means of bringing student concerns to the attention of the faculty and administration and of formulating student opinion on various issues on the campus and in the world at large. In pursuit of these goals, student publications enjoy the freedom of the press. At the same time, the editorial freedom of student editors and managers entails a corollary obligation to be governed by the canons of responsible journalism.

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# University Discipline

## THE FACULTY-STUDENT COMMITTEE ON DISCIPLINE (UNDERGRADUATE)

### Powers

The Committee on Discipline, comprising students, faculty members, and administrators, is responsible for the administration of the stated rules and regulations governing undergraduate conduct, for assessing reported violations, and, when necessary, for assigning and recommending appropriate penalties.

### Membership

The committee consists of five student members selected by the Undergraduate Student Government, four elected members of the faculty, the Dean of the College, who sits with the committee without vote, the Dean of Student Life, who serves as chair and votes only in the event of a tie as set forth below, an Associate or Assistant Dean of the College, and an Associate Dean of Student Life, who serves as secretary without vote. An Assistant Dean of Student Life may serve as secretary in the absence of the Associate Dean. A quorum consists of at least three student members, at least two faculty members, and either the Dean of Student Life or the Dean (or Associate or Assistant Dean) of the College, who shall have the duties and powers of the Dean of Student Life in his or her absence.

### General Procedures

If a student is alleged to have committed a minor infraction for which precedents are available and for which the penalty will not interrupt the student's academic career, he or she is first asked to meet with the appropriate Director of Studies (if the student lives in a residential college) or with the Dean or an Associate Dean of Student Life (if the student lives in one of the upperclass dormitories or off campus). The Associate Dean or the Director of Studies will investigate all complaints promptly. The facts of the case are discussed and the student is given ample time and opportunity to present his or her account of the incident in question. If the student lives in a residential college, the Director of Studies brings the case forward (with a recommendation for action) to the Residential College Disciplinary Board, composed of the five Directors of Studies, and the Associate Dean of Student Life. The Residential College Disciplinary Board determines the appropriate action, up to and including disciplinary probation. If the student lives in an upperclass dormitory or off campus, the Dean or the Associate Dean of Student Life takes the appropriate action (up to and including disciplinary probation). An Assistant Dean of Student Life may assist the Associate Dean in the investigation and resolution of any case.

A student has the right to appeal to the Dean of Student Life any decision of an Associate Dean. The deadline for filing such an appeal is one week from the date of the original decision. The student should understand that, in hearing the appeal, the Dean of Student Life is not bound in any way by the prior decision of the Associate Dean and that, after reviewing the facts, the Dean of Student Life may impose a greater or lesser penalty than that originally imposed by the Associate Dean.

In such cases involving minor infractions, a student has the right to appeal to the Committee on Discipline the decision of the Dean of Student Life or the Residential College Disciplinary Board. The deadline for filing such an appeal is one week from the date of the decision of the Dean of Student Life or the Residential College Disciplinary Board.

On appeal, the student receives a full hearing by the Committee on Discipline, in accordance with the procedures followed in cases referred directly to the committee for action. The student should understand that, in hearing the appeal, the Committee on Discipline is not bound in any way by the prior decision of the Dean or the Residential College Disciplinary Board and that, after reviewing the facts, the committee may impose a greater or lesser penalty than that originally imposed by the Dean or the Residential College Disciplinary Board. The Dean of the College or an Assistant or Associate Dean of the College will serve as chair of the committee on Discipline in the event of an appeal of a decision by the Dean of Student Life or the Residential College Disciplinary Board. In such circumstances, the Dean of Student Life sits with the committee, without vote.

All alleged academic infractions and any other potentially serious infraction for which the penalty might interrupt the student's academic career are normally referred directly to the Committee on Discipline. Other cases, judged to be minor, but for which no clear precedent exists, are also normally referred to the committee. In all cases referred to the committee, the student involved is informed in writing of the reason for being summoned and of the specific day and time when the student is to appear before the committee. The student may obtain from the Office of the Dean of Student Life reports of the alleged misconduct and the names of the members of the committee. Matters shall be presented to the committee with all reasonable promptness. Where a matter is first presented to the Office of the Dean of Student Life within one week of the end of an academic term, it may be held for consideration in the following term.

In exceptional circumstances involving infractions described in the preceding paragraph, a student may request a hearing by the Dean of Student Life, waiving the right to a hearing by the Committee on Discipline. If the Dean agrees to hear the case, the student retains the right to appeal the decision to the President for clemency.

Disciplinary cases involving allegations of sexual harassment or assault by a student (undergraduate or graduate) that are not resolved by the Associate Dean of Student Life, the Assistant Dean of the Graduate School, or the Residential College Disciplinary Board will be adjudicated by a designated subcommittee of the Committee on Discipline, which will make recommendations concerning its findings and, if necessary, a penalty, to the Dean of Student Life or to the Dean of the Graduate School. Appeals of the decision of the respective Deans to either the President or to the Judicial Committee of the CPUC will follow normal procedures governing the review of disciplinary decisions. A more detailed description of these procedures is available in the Office of the Dean of Student Life and in the Office of the Dean of the Graduate School.

Pending action on the charges by the committee or pending an appeal, the student may remain in residence on campus, attend classes, and make use of all University facilities, except for reasons relating to the student's physical or emotional safety or well-being, or for reasons relating to the safety of other members of the University community or of University property. The student should understand that, if the committee's decision proves adverse, or if an appeal proves unsuccessful, the decision of the committee will normally be considered effective as of the date of the original charge. If the final decision is a dismissal from the University (i.e., suspension, required withdrawal, or expulsion), the student will normally not earn credit for the semester in which the infraction occurred. If he or she has successfully completed course requirements while awaiting the final disposition of the matter, obtaining credit for the semester will be at the discretion of the Committee. Pending a hearing, or the student's decision about whether to appeal a dismissal from the University or the withholding of the degree and while an appeal is in process, the student's University transcript will bear the notation: "Status Under Review." Should the student decide not to appeal a dismissal or the withholding of the degree or should an appeal not result in an alteration of the committee's decision to dismiss the student or withhold his or her degree, the Registrar will record the fact of the penalty on the student's transcript.

**Conduct of Hearings**

The student may be accompanied at the committee hearing by an adviser, who must be a current member of the resident University community, and who may participate in the same manner as the student in the hearing. At the hearing any person with information about the matter before the committee may be requested to appear by the student, the Dean of Student Life, or the committee, subject to reasonable limits agreed on by the committee. A reasonable number of persons, all of whom normally must be current members of the resident University community, and whose only role is to provide information about the character and qualities of the student, may be permitted to appear at the hearing. The student has an opportunity to explain the circumstances from his or her point of view and may also question individuals who have provided information and may in turn be questioned by the committee members. After such questioning the student is given further opportunity to speak and is then excused while the committee deliberates and arrives at a decision by individual vote. In order to determine that a student has violated a University rule, a majority of the committee members present must conclude that the evidence presented constitutes a clear and persuasive case in support of the charges against the student. If the student is found to have misled the committee during the hearing, the committee may take that fact into account in reaching a conclusion and assigning a penalty.

The chair or the secretary of the committee informs the student promptly of the decision. If a penalty is imposed, special effort is made in this discussion to ensure that the student fully understands why the penalty was imposed and its nature and consequences. The student has the right to receive a copy of the summary report of the proceedings upon request.

There may be some occasions in which, because of external legal proceedings, the student believes that there are compelling reasons for refusing to speak or to answer questions. In the event that (1) legal proceedings—including but not limited to arrest, summons, and indictment—have been instituted or are anticipated against a student in state or federal courts as a result of his or her alleged involvement in the matters that the committee is investigating and (2) the alleged misconduct is more serious than a disorderly person offense, the student will be granted permission not to speak or to answer questions without prejudicing the committee's decision. In the case of other external proceedings, the committee will consider the student's reasons for declining to speak within the full context of its knowledge of the case before it, and if it deems these reasons legitimate it will excuse the student from giving information without prejudice to its disposition of the case. In instances as set forth above, when a student has chosen not to speak, and when the committee does not have enough information to come to a conclusion, at the discretion of the Dean the hearing may be postponed until more complete information is available. In such instances the Dean normally will suspend the student, pending disposition of the legal proceedings and recommencement of thehearing. Such suspension should be without prejudice. The committee must explain to the student the risks either of speaking freely or of not speaking at all.

If the voting members are evenly divided on a particular case, the case must be reconsidered at the next meeting of the committee. If at the second meeting at which the case is considered the regular voting members are still evenly divided, the Dean of Student Life votes to break the tie.

### Appeals

A student has the right to appeal questions of procedural unfairness only to the Judicial Committee of the Council of the Princeton University Community, in accordance with the appeal procedures defined by the Judicial Committee. (See page 31.)

Alternatively, a student may appeal to the President of the University. Such an appeal is chiefly an opportunity for the student to seek clemency by explaining special circumstances that might be taken into account with respect to the penalties imposed. The purpose of an appeal to the President is not to initiate a rehearing of substantive issues of fact or a new determination of whether a violation of rules has occurred.

The deadline for filing either such appeal is one week from the date of decision by the Committee on Discipline.

### Records of Proceedings

Confidential records of all proceedings of the Committee and of the actions of the Residential College Disciplinary Board and the Deans are maintained in the offices of the Associate Dean. The use of these documents is restricted according to the rules and procedures concerning the confidential nature of student records.

Disciplinary procedures normally involve only the student and the University. Generally, the student's family is not informed while disciplinary procedures are under way. When, however, in the judgment of the University the welfare of the student or the community warrants communication, family members may be contacted during the disciplinary process. All disciplinary decisions resulting in serious penalties (especially, but not exclusively, withholding of degree, suspension, required withdrawal, and expulsion) will be communicated to the student's family or other legal guardian, unless the student has before the commencement of the term in question filed a statement certifying that he or she is not financially dependent as defined by the federal income tax laws.

### Penalties

Penalties that may be applied by all University disciplinary bodies are set forth in the section on General Conduct, under "University Regulations," pp. 2-3.

GRIEVANCE PROCEDURES

Information concerning grievance procedures is available on pages 17-20.

# CALIFORNIA STATE UNIVERSITY

## Education Code Sections

## 66300, 66017, and 69810, *et seq.*

### CHAPTER 5. RULES OF STUDENT CONDUCT

| **Section** | |
|---|---|
| 66300. | Rules governing student behavior. |
| 66301. | Freedom of speech; students' remedies; hate violence. |

### § 66300. Rules governing Student Behavior

The Regents of the University of California, the Trustees of the California State University, and the governing board of every community college district, shall adopt or provide for the adoption of specific rules and regulations governing student behavior along with applicable penalties for violation of the rules and regulations. The institutions shall adopt procedures by which all students are informed of such rules and regulations, with applicable penalties, and any revisions thereof. *(Stats.1976, c. 1010, § 2, operative April 30, 1977. Amended by Stats.1983, c. 143, § 50.)*

### § 66301. Freedom of speech; students' remedies; hate violence

(a) Neither the Regents of the University of California, the Trustees of the California State University, nor the governing board of any community college district shall make or enforce any rule subjecting any student to disciplinary sanction solely on the basis of conduct that is speech or other communication that, when engaged in outside a campus of those institutions, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution.

(b) Any student enrolled in an institution, as specified in subdivision (a), that has made or enforced any rule in violation of subdivision (a) may commence a civil action to obtain appropriate injunctive and declaratory relief as determined by the court. Upon motion, a court may award attorney's fees to a prevailing plaintiff in a civil action pursuant to this section.

(c) Nothing in this section shall be construed to authorize any prior restraint of student speech.

(d) Nothing in this section prohibits the imposition of discipline for harassment, threats, or intimidation, unless constitutionally protected.

(e) Nothing in this section prohibits an institution from adopting rules and regulations that are designed to prevent hate violence, as defined in subdivision (a) of Section 4 of Chapter 1363 of the Statutes of 1992, from being directed at students in a manner that denies them their full participation in the educational process, so long as the rules and regulations conform to standards established by the First Amendment to the United States Constitution and Section 2 of Article 1 of the California Constitution for citizens generally.

### § 66017. Willful disruption of orderly campus operation; disciplinary action

The respective governing boards of the California Community Colleges, the California State University, or the University of California shall adopt appropriate procedures and designate appropriate persons to take disciplinary action against any student, member of the faculty, member of the support staff, or member of the administration of the community college, state college, or state university who, after a prompt hearing by a campus body, has been found to have willfully disrupted the orderly operation of the campus. Nothing in this section shall be construed to prohibit, where an immediate suspension is required in order to protect lives or property and to ensure the maintenance of order, interim suspension pending a hearing; provided that a reasonable opportunity be afforded the suspended person for a hearing within 10 days. The disciplinary action may include, but need not be limited to, suspension, dismissal, or expulsion. Section 89538 to 89540, inclusive, shall be applicable to any state university or college employee dismissed pursuant to this section. *(Stats.1979, c. 1010, § 2, operative April 30, 1977. Amended by Stats.1979, c. 373, p.1281, § 80; Stats.1990, c. 1372 (S.B.1854), § 210.)*

## ARTICLE 15. FORFEITURE OF STATE AID TO STUDENTS

**Section**

69810. Financial aid agreement; ineligibility for state financial aid; hearing board.
69811. Notice of report to hearing board; hearing; determination of suspension of financial aid; notification of determination.
69812. Suspension or refusal of aid; misconduct.
69813. "State financial aid."

### § 69810. Financial aid agreement; ineligibility for state financial aid; hearing board

In accepting a scholarship, loan, fellowship, grant-in-aid, or any other financial aid given or guaranteed by the state for assistance, every recipient thereof who is a student at a public or private university, college, or other institution of higher education, shall be deemed to have agreed to observe the rules and regulations promulgated by the governing authority of the university, college, or other institution of higher education, for the government thereof.

Any recipient of this state financial aid who, on the campus of the university, college, or other institution of higher education, willfully and knowingly commits any act likely to disrupt the peaceful conduct of the activities of the campus, and is arrested and convicted of a public offense arising from the act, may be determined to be ineligible for any state financial aid for a period not to exceed the ensuing two academic years.

Any recipient of this state financial aid who, after a hearing, is found to have willfully and knowingly disrupted the orderly operation of the campus, but has not been arrested and convicted, may be determined to be ineligible for any state financial aid for the period as the hearing board may determine, not to exceed the ensuing two academic years.

Any recipient who is suspended from an institution of higher education of these acts shall be ineligible for state financial aid for a period not less than the time of the suspension.

The governing authority of the university, college, or other institution of higher education shall, for purposes of this section, cause to be reviewed the record of each recipient and shall, as soon as practicable, notify a hearing board established by it of the name of any recipient who committed any act likely to disrupt the peaceful conduct of the activities of the campus and was arrested and convicted of any public offense arising from that act, or is found to have willfully and knowingly disrupted the orderly operation of the campus, or has been suspended from an institution of higher education for these acts. *(Stats.1976, c. 1010, § 2, operative April 30, 1977. Amended by Stats. 1987, c. 678, § 1, operative Jan. 1, 1993).*

### § 69811. Notice of report to hearing board; hearing; determination of suspension of financial aid; notification of determination

Upon receipt of notice, as provided in Section 69810 that any recipient has committed any act likely to disrupt the peaceful conduct of the activities of the campus and was convicted of a public offense in connection therewith, or is found to have willfully and knowingly disrupted the orderly operation of the campus, or has been suspended from an institution of higher education for these acts, the hearing board shall immediately give the recipient written notice of the report. The notice shall inform the recipient of the pendency of the proceedings for the suspension of assistance. It shall inform the recipient that he may present evidence of mitigating circumstances to the hearing board within 14 calendar days of the date of the mailing of the notice, and shall specify the procedures and means by which such evidence is to be presented, including the date at which any hearing to be afforded him is to be held. The hearing board may prescribe any procedures and means for these purposes which it may deem appropriate, provided that any hearing which may be afforded the recipient shall not be held sooner than seven days after the date of the mailing of the notice.

If no response to the hearing board's notice is made within the period specified in this section, the hearing board may suspend further assistance to the recipient and the suspension shall remain in effect not to exceed the ensuing two academic years.

After the conclusion of proceedings provided for in this section, the hearing board shall, by majority vote, determine whether further assistance to the recipient shall be suspended. If the recipient was arrested and convicted of a public offense arising from campus disruption, the suspension may remain in effect for a period not to exceed the ensuing two academic years. If the recipient is found by the hearing board to have willfully and knowingly disrupted the orderly operation of the campus, but has not been arrested and convicted, the hearing board may suspend further assistance to the recipient for the period as the hearing board may determine not to exceed the ensuing two academic years. If the recipient was suspended from an institution of higher education for these acts, the hearing board shall suspend further assistance to the recipient for a period not less than the time of the suspension. The findings of the hearing board shall be in writing.

The hearing board shall notify the appropriate state agencies of any suspension of state financial aid pursuant to this section and no state financial aid shall be extended to the recipient during this period.

Any notice required to be made by this section shall be sufficient when it is deposited in the United States registered or certified mail, postage paid, addressed to the last known address of the addressee. *(Stats.1976, c. 1010 § 2, operative April 30, 1977. Amended by Stats.1987, c. 678, § 2, operative Jan. 1, 1993.)*

### § 69812. Suspension or refusal of aid; misconduct

Nothing in this article shall be construed to prohibit any public or private university, college, or other institution of higher education from suspending or refusing to grant scholarship, loans, fellowships, grants-in-aid, or any other financial aid given or guaranteed by the state for academic assistance to any individual because of any other misconduct that in its judgment bears adversely on his or her fitness for the assistance. *(Stats.1976, c. 1010, § 2, operative April 30, 1977. Amended by Stats.1987, c. 678, § 3, operative Jan. 1, 1993; Stats.1989, c. 1113, § 40.3.)*

### § 69813. "State financial aid"

For the purposes of this article, "state financial aid" means any assistance given or guaranteed by the state that is predicated on attendance at an institution of higher education. (Stats.1976, c. 1010, § 2, operative April 30, 1977. Amended by Stats.1989, c. 1113,§40.5.)

# California Code of Regulations

## Title 5

### Article 2. Student Discipline

**§ 41301. Expulsion, Suspension and Probation of Students.**

Following procedures consonant with due process established pursuant to Section 41304, any student of a campus may be expelled, suspended, placed on probation or given a lesser sanction for one or more of the following causes which must be campus related:

(a) Cheating or plagiarism in connection with an academic program at a campus.

(b) Forgery, alteration or misuse of campus documents, records, or identification or knowingly furnishing false information to a campus.

(c) Misrepresentation of oneself or of an organization to be an agent of a camous.

(d) Obstruction or disruption, on or off campus property, of the campus educational process, administrative process, or other campus function.

(e) Physical abuse on or off campus property of the person or property of any member of the campus community or of members of his or her family or the threat of such physical abuse.

(f) Theft of, or non-accidential damage to, campus property, or property in the possession of, or owned by, a member of the campus community.

(g) Unauthorized entry into, unauthorized use of, or misuse of campus property.

(h) On campus property, the sale or knowing possession of dangerous drugs, restricted dangerous drugs, or narcotics as those terms are used in California statutes, except when lawfully prescribed pursuant to medical or dental care, or when lawfully permitted for the purpose of research, instruction or armlysis.

(i) Knowing possession or use of explosives, dangerous chemicals or deadly weapons on campus property or at a campus function without prior authorization of the campus president.

(j) Engaging in lewd, indecent, or obscene behavior on campus property or at a campus function.

(k) Abusive behavior directed toward, or hazing of, a member of the campus community.

(l) Violation of any order of a campus president, notice of which had been given prior to such violation and during the academic term in which the violation occurs, either by publication in the campus newspaper, or by posting on an official bulletin board designated for this purpose, and which order is not inconsistent with any of the other provisions of this Section.

(m) Soliciting or assisting another to do any act which would subject a student to expulsion, suspension or probation pursuant to this Section.

(n) For purposes of this Article, the following terms are defined:

(1) The term "member of the campus community" is defined as meaning California State University and Colleges Trustees, academic, non-academic and administrative personnel, students, and other persons while such other persons are on campus property or at a campus function.

(2) The term "campus property" includes:

(A) real or personal property in the possession of, or under the control of, the Board of Trustees of the California State University and Colleges, and

(B) all campus feeding, retail, or residence facilities whether operated by a campus or by a campus auxiliary organization.

(3) The term "deadly weapons" includes any instrument or weapon of the kind commonly known as a blackjack, sling shot, billy, sandclub, sandbag, metal knuckles, any dirk, dagger, switchblade knife, pistol, revolver, or any other firearm, any knife having a blade longer than five inches, any razor with an unguarded blade, and any metal pipe or bar used or intended to be used as a club.

(4) The term "behavior" includes conduct and expression.

(5) The term "hazing" means any method of initiation into a student organization or any pastime or amusement engaged in with regard to such an organization which causes, or is likely to cause, bodily danger, or physical or emotional harm, to any member of the campus community; but the term "hazing" does not include customary athletic events or other similar contests or competitions.

(o) This Section is not adopted pursuant to Education Code Section 89031.

(p) Notwithstanding any amendment or repeal pursuant to the resolution by which any provision of this Article is amended, all acts and omissions occurring prior to that effective date shall be subject to the provisions of this Article as in effect immediately prior to such effective date.

### §41302. Disposition of Fees: Campus Emergency; Interim Suspension.

The President of the campus may place on probation, suspend, or expel a student for one or more of the causes enumerated in Section 41301. No fees or tuition paid by or for such student for the semester, quarter, or summer session in which he or she is suspended or expelled shall be refunded. If the student is readmitted before the close of the semester, quarter, or summer session in which he or she is suspended, no additional tuition or fees shall be required of the student on account of the suspension.

During periods of campus emergency, as determined by the President of the individual campus, the President may, after consultation with the Chancellor, place into immediate effect any emergency regulations, procedures, and other measures deemed necessary or appropriate to meet the emergency, safeguard persons and property, and maintain educational activities.

The President may immediately impose an interim suspension in all cases in which there is reasonable cause to believe that such an immediate suspension is required in order to protect lives or property and to insure the maintenance of order. A student so placed on interim suspension shall be given prompt notice of charges and the opportunity for a hearing within 10 days of the imposition of interim suspension. During the period of interim suspension, the student shall not, without prior written permission of the President or designated representative, enter any campus of the California State University and Colleges other than to attend the hearing. Violation of any condition of interim suspension shall be grounds for expulsion.

### §41303. Conduct by Applicants for Admission.

Notwithstanding any provision in this Chapter 1 to the contrary, admission or readmission may be qualified or denied to any person who, while not enrolled as a student, commits acts which, were he enrolled as a student, would be the basis for disciplinary proceedings pursuant to Section 41301 or 41302. Admission or readmission may be qualified or denied to any person who, while a student, commits acts which are subject to disciplinary action pursuant to Section 41301 or Section 41302. Qualified admission or denial of admission in such cases shall be determined under procedures adopted pursuant to Section 41304.

## §41304. Student Disciplinary Procedures for the California State University and Colleges.

The Chancellor shall prescribe, and may from time to time revise, a code of student disciplinary procedures for the California University and Colleges. Subject to other applicable law, this code shall provide for determinations of fact and sanctions to be applied for conduct which is a ground of discipline under Sections 41301 or 41302, and for qualified admission or denial of admission under Section 41303; the authority of the campus President in such matters; conduct related determinations on financial aid eligibility and termination; alternative kinds of proceedings, including proceedings conducted by a Hearing Officer, time limitations; notice; conduct of hearings, including provisions governing evidence, a record, and review; and such other related matters as may be appropriate. The Chancellor shall report to the Board his actions taken under this section.

# EXECUTIVE ORDER NO. 628

# STUDENT DISCIPLINARY PROCEDURES
# FOR
# THE CALIFORNIA STATE UNIVERSITY

## ARTICLE I: AUTHORITY AND PURPOSE

These procedures are established pursuant to Section 41304 of Title 5 of the California Code of Regulations. They govern determinations under Article 2, Subchapter 4, Chapter 1, Division 5 of that Code and other state and federal laws which require institutional hearings.

## ARTICLE II: DEFINITIONS

1. The term **"campus"** means a campus of the California State University.

2. The term **"campus official"** includes any person employed by a campus, performing assigned administrative or professional responsibilities.

3. The term **"Coordinator of University Student Discipline"** means a campus official or officials assigned by the President to be in charge of the administration of these procedures and to perform the duties prescribed in these procedures.

4. The term **"hearing officer"** means a person or persons appointed by the President to determine whether a student has violated the Student Code and to recommend imposition of sanctions.

5. The term **"may"** is used in the permissive sense.

6. The term **"President"** refers to the chief executive officer of a campus or that person's designee.

7. The term **"shall"** is used in the mandatory sense.

8. The term **"student"** means any person taking courses at a campus, both full-time and part-time, including summer session, special session and Extended Education.

9. The term **"Student Code"** is defined as the causes for discipline listed in Section 41301 of Title 5 of the California Code of Regulations.

**September 30, 1994**

10. The term **"working day"** shall mean any day during the academic year, summer session and special session other than a Saturday, Sunday, academic holiday of a campus as that term is used in Section 42800 of Title 5 of the California Code of Regulations.

## ARTICLE III: DUTIES OF PRESIDENT

### 1. Use of Attorneys

The President shall determine whether attorneys may be used in any or all parts of these proceedings. The inclusion or exclusion of attorneys from any or all parts of these proceedings shall apply equally to the campus and the student charged. Exclusion of attorneys from any or all parts of these proceedings does not prohibit the campus or the student charged from consulting an attorney, nor does it prohibit the hearing officer from being an attorney.

### 2. Assign Coordinator of University Student Discipline

The President shall assign a campus official or officials to be the Coordinator of University Student Discipline.

### 3. Appoint Hearing Officers

The President shall appoint one or more persons to serve as Hearings Officers. Hearing Officers may be campus officials, attorneys who are admitted to practice law in California or administrative law judges from the Office of Administrative Hearings. Subordinates of the Coordinator of University Student Discipline and any person who is a percipient witness of the events giving rise to a particular case are ineligible to serve as a Hearing Officer on that case.

### 4. Final Decision

The President shall have the responsibility of making the final decision regarding disciplinary action after reviewing a Hearing Officer's written report.

5. **Notification of Decision**

The President shall cause notice of his or her decision to be sent to the student charged as provided in Section 6.b. of Article IX.

6. **Delegation of Duties**

The duties of the President may be delegated to individual designees who are campus officials.

## ARTICLE IV: DUTIES OF COORDINATOR OF UNIVERSITY STUDENT DISCIPLINE

1. **Appointment**

The Coordinator of University Student Discipline shall serve at the pleasure of the President.

2. **Decision to Initiate Disciplinary Action**

The Coordinator of University Student Discipline shall make the decision as to whether disciplinary action shall be taken.

3. **Scheduling of Hearings**

The Coordinator of University Student Discipline shall make the physical and scheduling arrangements for hearings held under these procedures.

4. **Campus Representative**

The Coordinator of University Student Discipline shall represent the campus in all hearings.

5. **Notification to Victims of Sexual Assault or Physical Abuse**

The Coordinator of University Student Discipline shall notify alleged victims of sexual assault or physical abuse of the results of any disciplinary action taken within three (3) working days following that disciplinary action. (Education Code Section 67143)

6. **Notification to Victims of Crime of Violence**

The Coordinator of University Student Discipline may notify alleged victims of a crime of violence of the results of any disciplinary action taken. The term **"crime of violence"** means (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. (Section 1232g (b)(6) of Title 20 of the United States Code)

## ARTICLE V: PROHIBITED CONDUCT

1. **Conduct -- Rules and Regulations**

Any student found to have violated the Student Code is subject to the disciplinary sanctions in Article VI.

2. **Violation of Law and Campus Discipline**

At the campus's discretion, disciplinary proceedings may be instituted against a student charged with a violation of law which is also a violation of the Student Code, for example, if both violations result from the same factual situation, without regard to the pendency of civil litigation in court or criminal arrest and prosecution. Proceedings under these procedures may be carried out prior to, simultaneously with, or following civil or criminal proceedings off-campus. (Goldberg v. Regents of the University of California (1967) 248 Cal.App.2d 867))

## ARTICLE VI: SANCTIONS

1. The following sanctions may be imposed upon any student found to have violated the Student Code:

   a. **Probation:** A period of time during which the privilege of continuing in student status is conditional. The conditions may include, but are not limited to, loss of specified privileges which a current student would otherwise be entitled to and an acknowledgment by the student that any additional violations of the Student Code will result in a more serious sanction.

b. **Suspension:** Separation of the student from student status from the campus for a definite period of time, after which the student is eligible to return. Conditions for readmission may be specified.

c. **Expulsion:** Permanent separation of the student from student status from the campus.

2. **Multiple Sanctions**

More than one of the sanctions listed above may be imposed for any single violation.

3. **Denial of Access**

After a hearing, any suspension or expulsion based on conduct which disrupted the orderly operation of a campus or other facility and which also violates a provision of a California statute may include denial of access to the campus or facility as a condition of such suspension or expulsion for the period of the suspension or in the case of expulsion for a period not to exceed one year. (Penal Code Section 626.2) A student who willfully and knowingly enters the campus or facility during the period for which access has been denied is guilty of a misdemeanor pursuant to Penal Code Section 626.2. In the case of a suspension, such entry may be grounds for further disciplinary action.

4. **Denial of Admission or Readmission**

Admission or readmission may be qualified or denied to any student found to have violated the Student Code. (Section 41303 of Title 5 of the California Code of Regulations)

5. **Good Standing**

Imposition of a sanction or sanctions or the denial or qualification of admission or readmission means that the student is not considered to be in good standing for admission purposes at any institution of the California State University during the term of the sanction. (Section 40601(g) of Title 5 of the California Code of Regulations)

6. **Record of Discipline**

Probation and suspension shall be made part of the student's academic record during the term of the probation or suspension. Expulsion shall be made part of the student's permanent academic record.

## ARTICLE VII: INTERIM SUSPENSION

1. **Grounds**

The President may immediately impose an interim suspension where there is reasonable cause to believe that it is required to protect personal safety or property and to ensure the maintenance of order. (Section 41302 of Title 5 of the California Code of Regulations)

2. **Notification**

A student placed on interim suspension shall be given prompt notice of the charges and the opportunity for a hearing within ten (10) working days of the imposition of the suspension. (Section 41302 of Title 5 of the California Code of Regulations) The hearing shall be held pursuant to the provisions of Article IX of these procedures.

3. **Denial of Presence on Campus**

During the period of the interim suspension, the student shall not, without prior written permission of the President, enter any campus of the California State University other than to attend the hearing. Violation of any condition of interim suspension shall be grounds for expulsion. (Section 41302 of Title 5 of the California Code of Regulations)

4. **Hearing**

If requested timely by the student, a hearing will be held to determine whether continued suspension pending a disciplinary hearing is required to protect personal safety or property and to ensure the maintenance of order. This hearing may also serve as a disciplinary hearing in accordance with the procedures outlined in Article IX, provided proper notification has been given as delineated in Article IX, Section 3.

## ARTICLE VIII: CONDUCT BY APPLICANTS FOR ADMISSION

Admission or readmission may be qualified or denied to any person who, while not enrolled as a student, commits acts which, were he or she enrolled as a student, would be the basis for disciplinary proceedings pursuant to Article V or Article VII of these procedures. Qualified admission or denial of admission in such case shall be determined by a hearing held pursuant to Article IX of these procedures. (Section 41302 of Title 5 of the California Code of Regulations)

## ARTICLE IX: PROCEEDINGS

1. **Investigation**

   a. A complaint alleging that a student has violated the Student Code shall be directed to the Coordinator of University Student Discipline. Any complaint should be submitted as soon as possible after the event takes place.

   b. A complaint is not necessary for the Coordinator to determine that charges should be initiated.

   c. The Coordinator shall investigate each complaint filed and determine whether or not charges should be brought.

2. **Conference**

   Except when the student refuses to cooperate, the Coordinator shall hold a conference with the student to obtain his or her response to the alleged misconduct and to determine whether the allegations of misconduct have merit and if they may be disposed of informally by mutual consent of the student charged and the Coordinator. The student may have another person present to observe and consult with. If the campus has elected to exclude attorneys from this part of the proceedings, the Coordinator holding the conference shall not be an attorney. In addition to the sanctions listed in Article VI, an agreement reached during this conference may include voluntary actions by the student charged including but not limited to work assignments, service to a campus, obtaining psychological counseling or compensation for loss, damage or injury.

3. **Notice of Hearing**

a. If the allegations of misconduct have not been resolved by conference as provided in Section 2 of this Article and the Coordinator of University Student Discipline determines that formal disciplinary action should be taken, the Coordinator of University Student Discipline shall initiate the disciplinary action process by a written Notice of Hearing served in person or served by certified mail return receipt requested to the student charged at the last known address on campus records.

b. The Notice of Hearing shall include the following:

1) A statement of the specific subdivisions of the Student Code which the student is being charged with violating.

2) A factual description of the conduct upon which the charges are based.

3) A recommended sanction and notification that the hearing officer is not bound by the recommended sanction and may impose a more severe sanction than recommended by the campus.

4) The date, time and place of the hearing.

5) The office at the campus where additional information regarding the evidence may be obtained.

6) Notification that the student may be accompanied at the hearing by an advisor of his or her choice, who may act on his or her behalf. Such notification must state whether the advisor may be an attorney. If the student's advisor may be an attorney, notification that the student must inform the Coordinator of University Student Discipline of the name and address of the student's attorney at least five (5) days prior to the hearing.

7) Notification that the student charged may elect to waive his or her right to hearing by accepting the recommended sanction.

8) Such information as notice of an immediate suspension and/or withdrawal of consent to remain on campus where such action is appropriate.

9) A copy of these procedures or notification of where the student may obtain a copy without charge. If consent to remain on campus has been withdrawn from the student at the time the Notice of Hearing is sent, a copy of these procedures shall be enclosed with the notice.

c. The Notice of Hearing shall be served on the student at least ten (10) working days prior to the hearing. If all parties agree, the ten day period may be waived.

d. The charges stated in the Notice of Hearing may be amended at any time. If the amendment would require the student to prepare a defense which is different from that required by the prior Notice of Hearing, any hearing which has been scheduled shall upon request be postponed for a reasonable time. If the charges are amended after a hearing has commenced, the Hearing Officer may postpone the hearing for a reasonable period of time.

### 4. Hearing

a. All hearings held under these procedures shall be conducted according to the following:

1) Hearings shall be closed to all persons other than the person conducting the hearing, the student charged, the Coordinator of University Student Discipline, a single advisor for the student charged, a single advisor for the Coordinator of University Student Discipline, the person designated to record the hearing and witnesses while they are testifying.

2) The student may be accompanied by one advisor of his or her choice, who may act on his or her behalf. If the campus has elected to exclude attorneys from this part of the proceedings, the advisor may not be an attorney.

3) The Coordinator of University Student Discipline representing the campus may be accompanied by one advisor of his or her choice. If the campus has elected to exclude attorneys from this part of the proceedings, neither the

Coordinator representing the campus at the hearing or the Coordinator's advisor may not be an attorney.

4) The campus and the student charged shall have the opportunity of presenting witnesses, subject to the right of cross examination as well as questioning by the Hearing Officer. If the student charged elects to testify, he or she shall be subject to cross examination and questioning by the Hearing Officer.

5) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. No evidence other than that received at the hearing shall be considered by the Hearing Officer.

6) The Hearing Officer shall make all rulings on matters relating to the conduct of the hearing, including matters regarding admission of evidence. Any evidence deemed relevant by the Hearing Officer shall be admitted. Unduly repetitious evidence shall be excluded.

7) A tape recording shall be kept of the hearing. The student charged may, at his or her own expense, request a copy of such recording. No tape recording by the student charged or other persons at the hearing shall be permitted. However, the student charged may, at his or her own expense, furnish a certified court reporter provided that the campus shall be permitted to make copies of the transcript at its own expense.

8) The student charged shall not be found to have violated the Student Code solely because he or she fails to appear at the hearing. If the student charged does not appear, the hearing shall proceed without him or her and a decision shall be rendered on the evidence presented.

9) Arguments by the student charged or his or her advisor concerning the legal (as distinguished from factual) applicability, or legal validity of any provision with which the student is charged, or of these procedures shall not be addressed to the Hearing Officer, but to the President in writing within three (3) working days following the conclusion of the hearing. The President shall

seek advice on the matter from the Office of General Counsel. Such advice shall be considered by the President before a final decision is rendered.

10) Where the person testifying is an alleged victim of sexual or physical assault which is the basis for the disciplinary action, that person may be accompanied at the hearing by another person. The other person is not permitted to speak or to participate directly in the hearing. Cross examination of the alleged victim shall be limited to the alleged incident leading to the chance and the events surrounding the charge.

11) The Hearing Officer is responsible for maintaining order, and may establish such rules as are necessary or appropriate to conducting a fair hearing. The Hearing Officer shall not permit any person to be subjected to abusive treatment. The Hearing Officer may eject or exclude anyone who refuses to be orderly.

b. Where more than one student is charged with conduct arising out of a single occurrence or out of connected multiple occurrences, if the Coordinator of University Student Discipline and the students charged consent, a single hearing may be held for all of the students so charged. Students may request that their case be consolidated with others, or separated from others. The Coordinator of University Student Discipline shall make determinations regarding consolidation. All such determinations shall be subject to revision by the Hearing Officer. In the event of such revision, all cases affected shall be rescheduled for hearing. The separation of one or more cases from a group of cases previously set for a consolidated hearing shall not be considered to affect the remaining cases in the group.

c. At any time during the hearing process, the student charged may elect to waive the hearing and accept a sanction recommended by the Coordinator of University Student Discipline. The waiver and acceptance of the recommended sanction shall be in writing.

5. **Recommendation of the Hearing Officer**

a. After the hearing, the Hearing Officer shall make findings of fact and conclusions about whether the facts demonstrate a violation of the Student Code with which the student is charged. The Hearing Officer's determination shall be made on the basis of whether it is more likely than not that the student charged violated the Student Code (i.e., by a preponderance of the evidence).

b. After having made its determination, the Hearing Officer shall submit a written report to the President which includes a determination as to whether the student charged violated the Student Code and the Hearing Officer's recommended sanction, if any. The Hearing Officer's report shall be submitted to the President within ten (10) working days of the conclusion of the hearing.

6. **Presidential Action**

a. After reviewing the Hearing Officer's report, the President shall make the final decision regarding disciplinary action. The President may impose the sanction recommended, adopt a lesser sanction, refer the matter back to the Hearing Officer for further findings on specified issues or after reviewing the entire record may adopt a more severe sanction. If the President decides to adopt a more severe sanction, the President shall articulate the reasons for the more severe sanction in his or her decision. The President normally shall render a decision within five (5) working days of receipt of the Hearing Officer's report.

b. The President shall cause notification of his or her decision to be delivered to the student charged. The notification shall be delivered in person or sent by certified mail return receipt requested to the student charged. Notices addressed to the student at the last known address on campus records and deposited in the United States mail, postage prepaid, shall be presumed to have been received by the student. The report of the Hearing Officer shall be made available to the student charged upon request.

# University of Iowa

## II. STUDENT RESPONSIBILITIES

### A. Code of Student Life

#### Introduction

Academic institutions exist for the advancement of knowledge, the pursuit of truth, the development of students, and the general well being of society. Free inquiry and free expression are indispensable to the attainment of these goals. As members of the academic community, students are encouraged to develop a capacity for critical judgment and to engage in a sustained and independent search for truth. Freedom to teach and freedom to learn are inseparable facets of academic freedom. The freedom to learn depends upon appropriate opportunities and conditions in the classroom, on the campus, and in the larger community. Students are expected to exercise their freedom to learn with responsibility and to respect the general conditions conducive to such freedom. Accordingly, the University has developed the following general regulations pertaining to student conduct which provide and safeguard the right of every individual student to exercise fully freedom to learn without undue interference by others

The Code of Student Life is applicable whether or not the University is in session and pertains to all persons registered for a University of Iowa course, all persons admitted to any academic program, and all persons attending a University-sponsored program. In addition, conduct violative of the Code of Student Life and engaged in prior to admission may be taken into account in the admissions decision and may be grounds for filing disciplinary charges after admission or acceptance into a program. For purposes of the conduct regulations and judicial procedures, a student is any person fitting one or more of these descriptions.

It is the duty and responsibility of all students to acquaint themselves with all provisions of the code and particularly with the rules and regulations pertaining to personal conduct, and every student will be conclusively presumed to have knowledge of all rules and regulations contained in the code from the date of his or her initial registration at the University. The code may be amended at any time by authority of the president of the University. Amendments are effective upon approval of the president and publication in the Code of Student Life, provided that if the president deems an amendment of immediate importance, it shall be effective from and after publication in the *Daily Iowan*, which will be conclusively presumed as adequate notice to all students. A full and complete text of the code and other general University rules and regulations of personal conduct currently in effect, including all amendments, shall be on file in the Office of the Vice President for Student Services at all times and shall be available for inspection by students. The Vice President for Student Services shall be responsible for making available to students copies of all amendments deemed of immediate importance and for distributing copies of such amendments to all housing units, affected student organizations, and otherwise, as the Vice President for Student Services deems appropriate, provided that failure to make such distribution shall not affect the effectiveness of such amendments.

## General Conduct Regulations

Any student who commits any of the following acts of misconduct shall be subject to disciplinary action by the University. These regulations shall apply only where a student's misconduct has adversely affected some University process or function or some other distinct and clear interest of the University as an academic community. These regulations shall be construed so as not to abridge any student's constitutional rights of free expression of thought or opinion, free association, peaceable assembly, or the petition of authorities.

1. Academic misconduct, including the acquisition of honors, awards, certification or professional endorsements, degrees, academic credits, or grades by means of cheating, plagiarism, or falsification, including forgery, with respect to any examination, paper, project, application, recommendation, transcript, or test, or registration document or by any other dishonest means whatsoever, or aiding or abetting another student to do so. Resolution of Section 1 complaints will normally be handled within the college or department concerned, with provision for review (see Part C, Academic Misconduct).

2. Willful misrepresentation of any material fact to any member of the faculty or staff of the University or to any office, department, or committee thereof, or willful misrepresentation to anyone, within or without the University community, of his or her status with the University or of the support, sponsorship, or approval by the University of the services or activities of any person, group, or organization.

3. Willful failure to comply with a proper order or summons of any member of the faculty or other University official, properly identified -- by stating his or her name and title if requested by a student -- and acting within the scope of his or her authority, or willful failure of a student to identify himself or herself by stating his or her name to such faculty member or official. In the absence of specific authorization by a member of the central administration, it is understood that faculty members who do not hold administrative appointments are authorized to require identification as contemplated in this section only in a class, in the faculty member's office, in a library as to persons defacing or otherwise abusing library materials, and at University functions at which the faculty member is presiding.

4. Forgery, alteration, or misuse of any University record, form, document, or student identification card.

5. (a) Intentionally disrupting the orderly processes of the University, or (b) intentionally obstructing or denying access to services or facilities by those entitled to use such services or facilities, or (c) intentionally interfering with the lawful rights of other persons on the campus, or (d) inciting others to do acts proscribed by paragraphs (a), (b), or (c) of this section.

6. Willful demonstrations within the interior of any University building or structure, except as specifically authorized and subject to reasonable conditions imposed to protect the rights and safety of other persons and to prevent damage to property.

7. Unauthorized entry into or occupation of any University room, building, or area of the campus, including such entry or occupation at any unauthorized time, or any unauthorized or improper use of any University property, equipment, or facilities.

8. Intentional setting of fires in any University building or on the campus without proper authority, or intentional sounding of a false fire alarm or improper use of fire prevention equipment in any University building or on the campus.

9. Misuse or misappropriation of University property or private property on campus or off campus in connection with University activities, including but not limited to theft or wrongful appropriation, or willful destruction, damage, defacing, or mutilation of any property belonging to or in the possession or custody of another member of the University community or of the University

10. Assaulting, threatening, physically abusing, unduly harassing, or endangering in any other manner the health or safety of (a) a University student, staff, or faculty member if such conduct relates to the official business of the University or (b) any person on the campus or at any University-sponsored or supervised function or event.

11. Use or possession of serviceable firearms, ammunition, explosives, fireworks, or other dangerous articles on campus or within any University building on the campus, or at any University-sponsored or supervised function or event, except in authorized facilities.

12. Possession or consumption of an alcoholic beverage on campus, within any University building, or at any University-sponsored or supervised function or event off campus, except as permitted under the "Policy Regarding the Use of Illegal Drugs and Alcohol," "Code of Student Life," the *Residence Hall Guidebook*, or as authorized by other University regulations.

13. Use or possession of any narcotic drug, marijuana, or any other addictive, dangerous, or controlled substance on campus. Students found in violation of this section will, under ordinary circumstances, be required to complete a substance abuse evaluation and attend any educational or counseling sessions recommended as a result of the evaluation.

14. Sale, manufacture, distribution, or administration of any drug described in Section 12 or 13.

15. (a) Intentionally disrupting access of other students, faculty, or staff members to University computer resources, or (b) knowingly obtaining without authorization access to a computer account assigned to another person, or © knowingly using an account belonging to another University student, faculty, staff member, or academic department for other than its intended purpose without permission from the owner, or using an inactive account, or (d) using University computer

equipment to interfere with the lawful rights of others by such activities as falsifying or altering records or documents, damaging programs belonging to another, sending harassing or threatening material, or duplicating copyrighted software unlawfully, or (e) assisting another person to do any act proscribed under this section.

16. Violation of any other rule, regulation, or policy which may be promulgated by the president of the University or an authorized representative, by any college, department, residence hall, office, or other facility within the scope of its authority, or by the State Board of Regents, provided such rules, regulations, or policies were published, posted, or otherwise adequately publicized or the student had actual knowledge thereof. Included among "such rules, regulations, or policies" are the University Policy on Human Rights, the Policy on Sexual Harassment and Consensual Relationships, the Policy Concerning Use of the Pentacrest, and all provisions contained in the University residence halls contracts which pertain to personal conduct, including the *Residence Hall Guidebook*.

17. Any other conduct or action in which the University can demonstrate a clear and distinct interest as an academic institution and which seriously threatens (a) any educational process or other legitimate function of the University or (b) the health or safety of any member of the academic community. Student misconduct as defined in Sections 1-16 which occurs on property governed by the State of Iowa Board of Regents is considered within the scope of this regulation. This includes the campuses of Iowa State University and the University of Northern Iowa. Misconduct committed on college campuses not governed by the State Board of Regents may also violate this regulation.

## B. Judicial Procedure for Alleged Violations of the Code of Student Life

1. **Introduction.** These procedures are designed to cover complaints against students based on alleged violations of the Code of Student Life and the Policy on Sexual Harassment and Consensual Relationships. Alleged violations of Section 1 (academic misconduct) are handled under the procedures described in Part C, Academic Misconduct. Alleged violations of Sections 2-16 are ordinarily resolved by the dean of students, who may assign responsibility to a designated department head or assistant. Procedures used to resolve residence hall misconduct complaints are described below in Section H, Residence Hall Judicial System [not included here]. Persons with questions as to which University procedures apply to a particular situation may contact the Office of the Dean of Students or the University Ombudsperson for more information.

2. **Complaint Procedure.** Any person may bring a complaint against a student under these procedures based on an alleged violation of the Code of Student Life (see extent of jurisdiction in introduction). All such complaints shall be made to the Office of the Dean of Students. The Dean of Students shall designate a person to investigate and review the complaint and determine whether formal charges should be in order.

3. **Investigation.** The Dean of Students or designee will gather relevant evidence to determine whether there is a reasonable basis for believing that the Code of Student Life was violated. In order to make such a determination, the Dean of Students or designee may interview the complainant and witnesses. During the investigation, the Dean of Students or designee may meet personally with the student accused. Alternatively, the student accused may be notified of the complaint in writing and given an opportunity to respond. In the event that the Dean of Students or designee believes that evidence shows that there is a reasonable basis for believing a violation did occur, formal charges will be brought. During the period of investigation, the Dean of Students or designee may seek informal disposition of the complaint with the student accused. A student accused may consult with the University Ombudsperson or other advisers during the investigation as well as prior to a hearing or following a hearing.

4. **Charge Procedure.** If it is determined that formal charges should be brought, the Dean of Students or designee (hereinafter "charging party") shall send the student involved a Notice of Charge which shall (1) set out the rule or rules which have been allegedly violated, (2) state the alleged actions or behavior, (3) list the names of any witnesses intended to be called by the charging party, and (4) advise the student of his or her rights and of the hearing procedure, by attaching a copy of the hearing procedure to the letter.

When a student is formally charged with violating the Code of Student Life, the charging party may notify the student that an informal disposition of the charge may be pursued through discussions between the student and the charging party. If an informal disposition is made, the student will be sent a certified letter stating the terms of the disposition. No formal hearing will be held unless the terms of the informal disposition are breached.

If attempts at informal disposition of the alleged violation do not succeed, a Final Notice of Charge will be sent to the student with a copy to the administrative hearing officer. The administrative hearing officer shall be drawn from the pool of administrative hearing officers, selected by the president after consultation with the appropriate constituent groups. Another administrative hearing officer will serve if a student who is charged can adequately demonstrate why the assigned administrative hearing officer should not hear the case. Such an objection must be made in writing to the Dean of Student Services, with a copy to the assigned administrative hearing officer, at least two class days before the hearing is scheduled to begin.

The Dean of Students may elect to resolve two or more complaints against one student at a single hearing. In addition, the dean of students may elect to resolve a complaint against two or more students at separate hearings or at a single hearing in the event that the complaints arose out of the same transaction or occurrence. Any challenge about complaint consolidation or separation will be determined by the administrative hearing officer. To challenge a decision to separate or consolidate a complaint, the student accused must notify the administrative hearing officer of the ground(s) for the challenge in writing at least two class days before the hearing is scheduled to take place.

The administrative hearing officer shall set the time and place for the hearing and shall send notice of the hearing to the student charged and the charging party. The Notice of Hearing shall be sent by certified mail or served personally. If the student charged or the charging party cannot appear at the time specified, the student or the charging party must contact the administrative hearing officer at least two class days before the hearing is scheduled to begin to arrange a different time for the hearing. If the student charged has not contacted the administrative hearing officer and does not appear at the hearing, the administrative hearing officer may make a decision on the charge and sanction, if any. If the charging party has not contacted the administrative hearing officer at least two class days before the hearing is scheduled to begin and does not appear, the administrative hearing officer may postpone or continue the hearing or may drop the charge.

The student charged will be mailed the Final Notice of Charge at least seven class days before the hearing. Final Notice of Charge will be sent by certified mail or served personally. The student charged will receive notification of the names of any additional witnesses intended to be called by the charging party at least two class days prior to the hearing.

**5. Rights At and Before Hearing.** The student charged has the following rights at a hearing: (1) to present his or her side of the story; (2) to present witnesses and evidence on his or her behalf; (3) to cross-examine witnesses presenting evidence against the student; (4) to be represented by an adviser at the student's expense (if any expense is entailed). Prior to the hearing, the student has a right to examine his or her disciplinary file in the Office of the Dean of Students. The student also has a right to know, upon request, which written documents or other physical evidence in the disciplinary file the University representative plans to present at the hearing. To examine the disciplinary file or learn what documents will be presented at the hearing, the student must make the request at least two class days before the hearing is scheduled to take place.

**6. Hearing.** The administrative hearing officer shall preside at the hearing. The hearing officer (1) shall inform the student of the charge, the hearing procedures, and his or her rights and (2) shall answer any questions the student charged may have on these matters. The hearing officer shall hear and receive evidence to determine whether a violation of the Code of Student Life has occurred, and may request character evidence to aid in the determination of an appropriate sanction. The hearing shall be recorded.

The hearing shall be closed unless the student charged specifically requests in writing at least 24 hours before the hearing that the hearing be open. If the student requests an open hearing, the administrative hearing officer may nonetheless elect to close all or part of the hearing. In the case of an open hearing, the administrative hearing officer may elect to exclude persons who are to appear as witnesses

After informing the student of the charges, the hearing procedures, and his or her rights, the administrative hearing officer shall ask the student charged to plead guilty or not guilty. If the student pleads not guilty, the charging party shall present the University's case and shall offer evidence, which may include written testimony and witnesses, in support of the charge. The student charged may cross-examine the evidence presented by the charging party. The student charged may then present his or her case and may offer evidence, which may include written testimony and witnesses, in his or her behalf which shall be subject to cross-examination by the charging party.

The charging party bears the burden of showing by a preponderance of evidence that the Code of Student Life was violated. The administrative hearing officer may exclude irrelevant, immaterial, or unduly repetitive evidence. A finding by the administrative hearing officer shall be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their serious affairs. Objections to evidentiary offers may be made and shall be noted in the record.

After hearing all evidence on the issue of the Code of Student Life violations, the administrative hearing officer shall request both parties to offer evidence on the charging party's character, previous conduct, and similar evidence for the purpose of assisting the administrative hearing officer in determining an appropriate sanction, if any.

The administrative hearing officer's decision as to whether the Code of Student Life was violated and the appropriate sanctions, if any, may be rendered orally at the close of the hearing. A written decision shall ordinarily be issued within five working days after the hearing, and, in any event, within ten working days after the hearing.

Notification of Decision shall be sent to the student charged by certified mail, to the charging party, and to other appropriate University officers. If the charged student is found to have violated the Code of Student Life, the Notification of Decision letter shall include a statement of the right to appeal and reference to the appeal procedure.

7. **Appeal.** A student may appeal the decision of the administrative hearing officer to the Office of the Vice President for Academic Affairs (hereinafter "Vice President"). The charged student shall file a written petition for appeal with supporting materials (if desired) in the Vice President's office within ten class days following the receipt of the written notification of the administrative hearing officer's decision. The Vice President shall designate an appropriate individual to review the record of the hearing, and the past disciplinary records of the charged person. Ordinarily, no new evidence will be received.

During the appeal, sanctions imposed by the administrative hearing officer shall remain in effect. A student suspended or expelled may request, from the dean of student services, permission to attend classes until the vice president's designee has made a decision on appeal.

The Vice President's designee may recommend to the Vice President that the decision be affirmed. The Vice President's designee may also recommend that the decision be reversed, modified, or other appropriate relief granted, if substantial rights of the student have been prejudiced because (1) the finding of guilt was unsupported by substantial evidence in the record made before the administrative hearing officer when the record is viewed as a whole; (2) the sanction imposed for the violation was unreasonably harsh or inappropriate when the nature of the violation and the disciplinary record of the charged person are considered; (3) the decision as a whole was unreasonable, arbitrary, or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion; or (4) the procedures were not properly followed; or (5) new evidence, not reasonably available at the time of the hearing, is of sufficient importance to warrant reconsideration by the hearing officer. The student's written petition for appeal should specify the grounds for appeal.

The decision on appeal and the reasons therefore will be transmitted to the student charged, the charging party, and other appropriate University officials within 30 days of the receipt of the Notice of Appeal. The decision of the administrative hearing officer and the final decision on appeal, as well as the notices and other related documents, will be kept in the student's disciplinary file in the Office of the Dean of Students.

**8. Sanctions.** The administrative hearing officer has the authority to impose any one or a combination of the following disciplinary sanctions. These sanctions are to serve as guidelines rather than as a definitive list.

1. Disciplinary Warning: This is a strong, written warning that if there is a repetition of the same action or any other action in violation of the Rules and Regulations of the Code of Student Life, the student can expect additional disciplinary action. A record of the disciplinary action is kept on file.

2. Disciplinary Probation: When on disciplinary probation a student is not considered to be in good standing and any further violations may lead to suspension or expulsion from the University.

3. Restitution: A student may be assessed the repair/replacement cost for any damage he or she causes to property.

4. Educational Sanction: A student may be required to provide a specific service, or participate in a specific program, receive specific instruction, or complete a research assignment. The student is responsible for related expenses, including expenses for education, counseling, or treatment, if any expense is entailed.

5. Exclusion from University Facilities or Activities: A student may be prohibited from attending a class, undertaking University employment, entering a building, participating in an extra-curricular activity sponsored by the University, representing the University in an official capacity, or using other services provided by the University. Such exclusion may be for a definite or indefinite period of time.

6. Disciplinary Suspension: A student may be involuntarily separated from the University for a stated period of time after which readmission is possible. The administrative hearing officer shall determine when the suspension will become effective. A student with one or more violations may be suspended from the

university for an indefinite period of time. A student suspended indefinitely may petition to the dean of students for reinstatement.

7. Expulsion: When a student has a record of serious violations, he or she may be dismissed from the University permanently.

**9. Interim Suspension.** A student may be suspended from the University or have privileges revoked pending the outcome of a disciplinary proceeding if, in the judgment of the Dean of Students, the student's continued presence or use of privileges at the University pending the outcome of the proceeding is likely to cause harm to faculty, staff, or other students, other specified persons or groups, or University property. The Dean of Students will base an interim sanction judgment on evidence gathered in the initial stage of an investigation of the alleged conduct. Ordinarily, the dean or the dean's designee will converse with the student when interim suspension is considered.

A student suspended under this section may seek review of that decision by requesting the Dean of Students to reconsider the decision within five calendar days after the student has received Notice of Suspension. The student may request that an immediate formal University disciplinary hearing be held.

**10. Records.** If disciplinary action is taken against a student under these procedures and a sanction imposed, a record of the action will be kept by the Office of the Dean of Students. Record of nonacademic disciplinary sanctions will not, however, appear on the charged student's transcript.

Disciplinary actions are part of the education records of the student and, consequently, are not available for public disclosure or discussion. The Office of the Dean of Students will disclose information outside the University relating to a student's nonacademic disciplinary record, if prior written permission from the student has also been received.

**11. Concurrent Criminal Charges.** Students who face criminal charges may also be subject to University disciplinary sanctions if the conduct which gave rise to the criminal charges also violates the Code of Student Life. The University's investigation will not ordinarily commence until all criminal procedures have concluded. A student may request a hearing to resolve a University complaint while criminal charges are pending.

Because University regulations and procedures are distinct from criminal statutes and procedures, an outcome in a criminal or civil proceeding is not dispositive of the question of whether the Code of .Student Life was violated.

## C. Academic Misconduct

### Undergraduate Colleges

As stated in Section 1 of the Code of Student Life General Conduct Regulations, violation of the regulations for academic misbehavior is ordinarily handled within the department or college concerned. The following procedure applies specifically to the colleges of Liberal Arts, Education, Engineering, Nursing, Pharmacy, and Business Administration. Students who wish more specific information should inquire at the office of their respective dean.

### Reporting of Plagiarism and Cheating

All cases of plagiarism and cheating are reported for action to the designated person in the office of the Dean of the College, through departmental channels, with a statement of the necessary facts. The department and the instructor concerned may also submit recommendations in each case for appropriate disciplinary action.

### Disciplinary Action

(1) *By the Instructor.* The individual instructor may reduce the student's grade, including the assignment of the grade of "F" in the course. A report of this action should always be sent to the dean's office.

(2) *By the Dean.* The dean of the college or a student-faculty committee appointed by him or her may impose the following or other penalties as the offense may warrant: disciplinary probation, assessment of additional hours for the bachelor's degree, suspension from the college, or recommendation of expulsion from the University by the president.

### Referral to the Office of the Vice President for Academic Affairs

(1) *By the Dean.* In the cases of flagrant or repeated offenses or for other reasons deemed sufficient by the Dean of the College, the case and records may be referred to the Office of the Vice President for Academic Affairs for appropriate action.

(2) *By the Student.* If the student feels that the penalty imposed by the dean is unjust, the student may request a review by the Office of the Vice President for Academic Affairs.

### Graduate Colleges

Questions of academic dishonesty arising within the colleges of Medicine, Law, and Dentistry, and the Graduate College are treated on an individual basis.

In the Graduate College, the questions are handled at the departmental level. If the departmental decision is appealed, the dean may appoint an appeals committee of faculty and students from a slate of nominees prepared by the Graduate Council and the Graduate Student Senate to recommend an appropriate course of action.

Students in professional graduate colleges should inquire at the office of their respective dean for further information.

# THE CITY UNIVERSITY OF NEW YORK

STUDENT DISCIPLINARY PROCEDURE BYLAWS OF
THE CITY UNIVERSITY OF NEW YORK,
AS AMENDED BY THE BOARD OF TRUSTEES ON
FEBRUARY 24, 1992

## Section 15.3 STUDENT DISCIPLINARY PROCEDURES.

### Complaint Procedures:

a. Any charge, accusation, or allegation which is to be presented against a student, and, which if proved, may subject a student to disciplinary action, must be submitted in writing in complete detail to the office of the dean of students promptly by the individual, organization or department making the charge.

b. The chief student affairs officer of the college or his or her designee will conduct a preliminary investigation in order to determine whether disciplinary charges should be preferred. The chief student affairs officer or his or her designee will advise the student of the charge(s) against him or her, consult with other parties who may be involved or who have information regarding the incident, and review other relevant evidence. Following this preliminary investigation, which shall be concluded within thirty (30) calendar days of the filing of the complaint, the chief student affairs officer or designee shall take one of the following actions:

(i) dismiss the matter if there is no basis for the allegation(s) or the allegation(s) does not warrant disciplinary actions. The individuals involved shall be notified that the complaint has been dismissed;

(ii) refer the matter to conciliation. If a matter is referred to conciliation the accused student shall receive a copy of the notice required pursuant to section 15.3e of this bylaw; or

(iii) prefer formal disciplinary charges.

### Conciliation Conference:

c. The conciliation conference shall be conducted by the counselor in the office of the dean of students or a qualified staff or faculty member designated by the chief student affairs officer. The following procedures shall be in effect at this conference:

1. An effort will be made to resolve the matter by mutual agreement.

2. If an agreement is reached, the counselor shall report his/her recommendation to the chief student affairs officer for approval and, if approved, the complainant shall be notified.

3. If no agreement is reached, or if the student fails to appear, the counselor shall refer the matter back to the chief student affairs officer who will prefer disciplinary charges.

4. The counselor is precluded from testifying in a college hearing regarding information received during the conciliation conference.

**Notice of Hearing and Charges:**

d. Notice of the charge(s) and of the time and place of the hearing shall be personally delivered or sent by the chief student affairs officer of the college to the student at the address appearing on the records of the college, by registered or certified mail and by regular mail. The hearing shall be scheduled within a reasonable time following the filing of the charges or the conciliation conference. Notice of at least five business days shall be given to the student in advance of the hearing unless the student consents to an earlier hearing.

e. The notice shall contain the following:

1. A complete and itemized statement of the charge(s) being brought against the student including the rule, bylaw or regulation he/she is charged with violating, and the possible penalties for such violation.

2. A statement that the student has the following rights:

    (i) to present his/her side of the story;

    (ii) to present witnesses and evidence on his/her behalf;

    (iii) to cross-examine witnesses presenting evidence against the student;

(iv) to remain silent without assumption of guilt; and

(v) to be represented by legal counsel or an advisor at the student's expense.

3. A warning that anything the student says may be used against him/her at a non-college hearing.

**Faculty-Student Disciplinary Committee Procedures:**

f. The following procedures shall apply at the hearing before the faculty-student disciplinary committee:

1. The chairperson shall preside at the hearing. The chairperson shall inform the student of the charges, the hearing procedures and his or her rights.

2. After informing the student of the charges, the hearing procedures, and his or her rights, the chairperson shall ask the student charged to plead guilty or not guilty. If the student pleads guilty, the student shall be given an opportunity to explain his/her actions before the committee. If the student pleads not guilty, the college shall present its case. At the conclusion of the college's case, the student may move to dismiss the charges. If the motion is denied by the committee the student shall be given an opportunity to present his or her defense.

3. Prior to accepting testimony at the hearing, the chairperson shall rule on any motions questioning the impartiality of any committee member or the adequacy of the notice of the charge(s). Subsequent thereto, the chairperson may only rule on the sufficiency of the evidence and may exclude irrelevant, immaterial or unduly repetitive evidence. However, if either party wishes to question the impartiality of a committee member on the basis of evidence which was not previously available at the inception of the hearing, the chairperson may rule on such a motion. The chairperson shall exclude all persons who are to appear as witnesses, except the accused student.

4. The college shall make a record of each fact-finding hearing by some means such as a stenographic transcript, a tape recording or the equivalent. A disciplined student is entitled upon request to a copy of such a transcript, tape or equivalent without cost.

5. The student is entitled to a closed hearing but has the right to request an open public hearing. However, the chairperson has the right to hold a closed hearing

when an open public hearing would adversely affect and be disruptive of the committee's normal operations.

6. The college bears the burden of proving the charge(s) by a preponderance of the evidence.

7. The role of the faculty-student disciplinary committee is to listen to the testimony, ask questions of the witnesses, review the testimony and evidence presented at the hearing and the papers filed by the parties and render a determination as to guilt or innocence. In the event the student is found guilty, the committee shall then determine the penalty to be imposed.

8. At the end of the fact-finding phase of the hearing, the student may introduce additional records, such as character references. The college may introduce a copy of the student's previous disciplinary record, where applicable, provided the student was shown a copy of the record prior to the commencement of the hearing. The disciplinary record shall be submitted to the committee in a sealed envelope and shall not be opened until after the committee has made its findings of fact. In the event the student has been determined to be guilty of the charge or charges the records and documents introduced by the student and the college shall be opened and used by the committee for dispositional purposes, i.e. to determine an appropriate penalty if the charges are sustained.

9. The committee shall deliberate in closed session. The committee's decision shall be based solely on the testimony and evidence presented at the hearing and the papers filed by the parties.

10. The student shall be sent a copy of the faculty-student disciplinary committee's decision within five days of the conclusion of the hearing. The decision shall be final subject to the student's right of appeal.

11. Where a student is represented by legal counsel the President of the College may request that a lawyer from the general counsel's office appear at the hearing to present the college's case.

### Section 15.4 APPEALS.

An appeal from the decision of the faculty-student disciplinary committee may be made to the president who may confirm or decrease the penalty but not increase it. His/her decision shall be final except in the case of dismissals or suspension for more than one term. An appeal from a decision of dismissal or suspension for more than one term may be made to the appropriate committee of the board. Any appeal under this section shall be made in writing within fifteen days after the delivery of the decision appealed from. This requirement may be waived in a particular case for good cause by the president or board committee as the case may be. If the president is a party to the dispute, his/her functions with respect to an appeal shall be discharged by an official of the university to be appointed by the chancellor.

## Section 15.5 COMMITTEE STRUCTURE.

a. Each faculty-student disciplinary committee shall consist of two faculty members and two student members and a chairperson. A quorum shall consist of the chair and any two members. Hearings shall be scheduled at a convenient time and efforts shall be made to insure full student and faculty representation.

b. The president shall select in consultation with the head of the appropriate campus governance body or where the president is the head of the governance body, its executive committee, three (3) members of the instructional staff of that college to receive training and to serve in rotation as chair of the disciplinary committees. If none of the chairpersons appointed from the campus can serve, the president, at his/her discretion, may request that a chairperson be selected by lottery from the entire group of chairpersons appointed by other colleges. The chairperson shall preside at all meetings of the faculty/student disciplinary committee and decide and make all rulings for the committee. He/she shall not be a voting member of the committee but shall vote in the event of a tie.

c. The faculty members shall be selected by lot from a panel of six elected annually by the appropriate faculty body from among the persons having faculty rank or faculty status. The student members shall be selected by lot from a panel of six elected annually in an election in which all students registered at the college shall be eligible to vote. In the event that the student or faculty panel or both are not elected, or if more panel members are needed, the president shall have the duty to select the panel or panels which have not been elected. No individuals on the panel shall serve on the panel for more than two consecutive years.

d. In the event that the chairperson cannot continue, the president shall appoint another chairperson. In the event that a student or faculty seat becomes vacant and it is necessary to fill the seat to continue the hearing, the seat shall be filled from the faculty or student panel by lottery.

e. Persons who are to be participants in the hearings as witnesses or have been involved in preferring the charges or who may participate in the appeals procedures or any other person having a direct interest in the outcome of the hearing shall be disqualified from serving on the committee.

## Section 15.6 SUSPENSION OR DISMISSAL.

The board reserves full power to dismiss or suspend a student, or suspend a student organization for conduct which impedes, obstructs, or interferes with the orderly and continuous administration and operation of any college, school, or unit of the university in the use of its facilities or in the achievement of its purposes as an educational institution.

The Chancellor or Chancellor's designee, a president or any dean may in emergency or extraordinary circumstances, temporarily suspend a student, or temporarily suspend the privileges of a student organization or group for cause, pending an early hearing as provided in bylaw section 15.3 to take place within not more than seven (7) school days. Prior to the commencement of a temporary suspension of a student, the college shall give such student oral or written notice of the charges against him/her and, if he/she denies them, the college shall forthwith give such student an informal oral explanation of the evidence supporting the charges and the student may present informally his/her explanation or theory of the matter. When a student's presence poses a continuing danger to person or property or an ongoing threat of disrupting the academic process, notice and opportunity for denial and explanation may follow suspension, but shall be given as soon as feasible thereafter.

[Section 15.7, which is not printed herein, is the renumbered former Section 15.6 on the University Student Senate]

## Section 15.8 COLLEGE GOVERNANCE PLANS.

The provisions in a duly adopted college governance plan shall not be inconsistent with the provisions contained in this article.

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ATTACH 1

# University of Wisconsin System

## Chapter UWS 17

## STUDENT NONACADEMIC DISCIPLINARY PROCEDURES

(Chapter UWS 17 is an administrative code adopted by the Board of Regents as a set of disciplinary procedures for the University System. These procedures describe the actions which the University may take in response to student misconduct; they define non-academic misconduct which is prohibited; and they outline procedures which are to be used in resolving allegations of misconduct. (Academic misconduct is covered in UWS 14).)

UWS 17.01 Policy Statement
UWS 17.02 Definitions
UWS 17.03 Nonacademic misconduct subject to disciplinary action
UWS 17.04 Disciplinary sanctions
UWS 17.05 Disciplinary procedure
UWS 17.06 Hearing
UWS 17.07 Appeal to the chancellor
UWS 17.08 Discretionary appeal to the board of regents
UWS 17.09 Settlement
UWS 17.10 Effect of discipline within the institution
UWS 17.11 Effect of discipline within the university system
UWS 17.12 Right to petition for readmission
UWS 17.13 Designation of investigating officer
UWS 17.14 Nonacademic misconduct hearing committee: institutional option
UWS 17.15 Notice to students
UWS 17.16 Consistent institutional policies
UWS 17.17 Emergency suspension

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## UWS 17 -- STUDENT NONACADEMIC DISCIPLINARY PROCEDURES

(Note: See ch. UWS 14 for student academic disciplinary procedures)

**UWS 17.01 Policy Statement.** The board of regents, administration, faculty, academic staff and students of the university of Wisconsin system believe that the teaching, learning, research and service activities of the university can flourish only in an environment that is safe from violence and free of harassment, fraud, theft, disruption and intimidation. The university has a responsibility to identify basic standards of nonacademic conduct necessary to protect the community, and to develop procedures to deal effectively with instances of misconduct while observing the procedural and substantive rights of students. Any person who violates state or federal laws on university property may face prosecution in the appropriate courts. In addition, students, faculty or staff who violate university standards are subject to university disciplinary action. This chapter describes the standards and procedures for addressing nonacademic misconduct by students.

**History:** Cr. Register, May 1996, No. 485, eff., 9-1-96.

**UWS 17.02 Definitions.** In this chapter:

**(1)** "Chancellor" means the chancellor or designee.

**(2)** "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.

**(3)** "Days" means calendar days.

**(4)** "Disciplinary file" means the record maintained by the student affairs officer responsible for student discipline.

**(5)** "Disciplinary probation" means a status in which a student may remain enrolled in the university only upon the condition that the student complies with specified standards of conduct or other requirements or restrictions on privileges, for a specified period of time, not to exceed 24 months.

**(6)** "Disciplinary sanction" means any action listed in s. UWS 17.04(1) taken in response to student nonacademic misconduct.

**(7)** "Expulsion" means termination of student status with resultant loss of all student rights and privileges.

**(8)** "Harassment" means:

(a) Striking, shoving, kicking or otherwise subjecting another person to physical contact or attempting or threatening to do the same with the intent to harass or intimidate that person; or

(b) Engaging in a course of conduct or repeatedly committing acts which harass or intimidate another person, which serve no legitimate purpose, and which are intended to harass or intimidate another person.

**(9)** "Hearing examiner" means an individual appointed by the chancellor in accordance with s. UWS 17.14(2) for the purpose of conducting a hearing under s. UWS 17.06.

**(10)** "Institution" means any university, center, or an organizational equivalent designated by the board.

**(11)** "Investigating officer" means an individual, or his or her designee, appointed by the chancellor of each institution to carry out certain responsibilities in the course of investigations of nonacademic misconduct under this chapter.

**(12)** "Members of the university community" means students and employees of the university.

**(13)** "Nonacademic misconduct hearing committee" or "committee" means the committee or hearing examiner appointed pursuant to s. UWS 17.14 to conduct hearings under s. UWS 17.06.

**(14)** "Stalking" means repeatedly following or remaining in visual or physical proximity to a person, or repeatedly conveying verbal or written threats or threats implied by conduct, or a combination thereof, where:

(a) Such conduct is intentional;

(b) Such conduct is directed at a person;

(c) Such conduct would cause a reasonable person to be in reasonable apprehension of death, bodily harm, sexual assault, confinement or restraint;

(d) The actor has knowledge or should have knowledge that the specific person will be placed in reasonable apprehension of death, bodily harm, sexual assault, confinement or restraint; and

(e) The acts induce reasonable apprehension of death, bodily harm, sexual assault, confinement or restraint.

**(15)** "Student," means any person who is registered for study in an institution for the academic period in which the misconduct occurred, or between academic periods, for continuing students.

**(16)** "Student affairs officer" means the dean of students or student affairs officer designated by the chancellor to carry out duties described in this chapter.

**(17)** "Suspension" means a loss of student status for a specified length of time, not to exceed 24 months, with resultant loss of all student rights and privileges.

**History:** Cr. Register, May 1996, No. 485, eff., 9-1-96.

**UWS 17.03 Nonacademic Misconduct Subject to Disciplinary Action.** The university may discipline a student in nonacademic matters in the following situations:

**(1)** (a) For conduct which constitutes a serious danger to the personal safety of a member of the university community or guest.

(b) Examples of the conduct prohibited by this subsection include, but are not limited to: engaging in conduct that is a crime involving danger to property or persons, as defined in s. UWS 18.06(22)(d) (Note: The offenses enumerated in s. UWS 18.06 (22)(d) include serious crimes against the person, such as sexual assaults.); attacking or otherwise physically abusing, threatening to physically injure or physically intimidating a member of the university community or a guest; attacking or throwing rocks or other dangerous objects at law enforcement personnel, or inciting others to do so; selling or delivering a controlled substance, as defined in ch. 161, Wis. Stats., or possessing a controlled substance with intent to sell or deliver; removing, tampering with or otherwise rendering useless university equipment or property intended for use in preserving or protecting the safety of members of the university community, such as fire alarms, fire extinguishers, fire exit signs, first aid equipment, or emergency telephones; or obstructing fire escape routes.

**(2)** For stalking or harassment.

**(3)** For conduct that seriously damages or destroys university property or attempts to damage or destroy university property, or the property of a member of the university community or guest.

**(4)** (a) For conduct that obstructs or seriously impairs or attempts to obstruct or seriously impair university-run or university-authorized activities, or that interferes with or impedes the ability of a member of the university community, or guest, to participate in university-run or university-authorized activities.

(b) Examples of the conduct prohibited under this subsection include, but are not limited to: preventing or blocking physical entry to, or exit from, a university building, corridor or room; engaging in shouted interruptions, whistling, or similar means of interfering with a classroom presentation or a university-sponsored speech or program; obstructing a university officer or employee engaged in the lawful performance of duties; obstructing or interfering with a student engaged in attending classes or participating in university-run or university-authorized activities; or knowingly disrupting access to university computing resources, or misusing university computing resources.

**(5)** For unauthorized possession of university property or property of another member of the university community or guest.

**(6)** For acts which violate the provisions of Ch. UWS 18, Conduct on University Lands.

**(7)** For knowingly making a false statement to any university employee or agent on a university-related matter, or for refusing to identify oneself to such employee or agent.

**(8)** For violating a standard of conduct, or other requirement or restriction imposed in connection with disciplinary action.

**History:** Cr. Register, May 1996, No. 485, eff., 9-1-96.

**UWS 17.04 Disciplinary Sanctions. (1)** The following are the disciplinary sanctions that may be imposed for nonacademic misconduct, in accordance with the procedures of ss. UWS 17.05 through 17.07:

(a) A reprimand;

(b) Denial of specified university privileges;

(c) Imposition of reasonable terms and conditions on continued student status;

(d) Restitution;

(e) Removal of the student from the course in progress;

(f) Disciplinary probation;

(g) Suspension; or

(h) Expulsion.

**(2)** One or more of the disciplinary sanctions listed in sub. (1) may be imposed for an incident of nonacademic misconduct.

**(3)** Disciplinary sanctions shall not include the cut-off or revocation of student financial aid; however, this shall not be interpreted as precluding the individual operation of rules or standards governing eligibility for student financial aid under which the imposition of a disciplinary sanction could result in disqualification of a student for financial aid.

**History:** Cr. Register, May 1996, No. 485, eff., 9-1-96.

**UWS 17.05 Disciplinary Procedure.** The investigating officer may proceed in accordance with this section to impose, subject to hearing and appeal rights, one or more of the disciplinary sanctions listed in s. UWS 17.04(1).

**(1)** CONFERENCE WITH STUDENT. When the investigating officer concludes that proceedings under this section are warranted, the investigating officer shall promptly offer to discuss the matter with the student. The purpose of this discussion is to permit the investigating officer to review with the student the bases for his or her belief that the student engaged in nonacademic misconduct, and to afford the student an opportunity to respond. If the student does not respond to the investigating officer's offer to discuss the matter, the investigating officer may proceed to make a determination on the basis of the available information.

**(2)** DETERMINATION BY THE INVESTIGATING OFFICER THAT NO DISCIPLINARY SANCTION IS WARRANTED. If, as a result of a discussion under sub. (1), the investigating officer determines that nonacademic misconduct did not in fact occur, or that no disciplinary sanction is warranted under the circumstances, the matter will be considered resolved without the necessity for further action.

**(3)** PROCESS FOLLOWING DETERMINATION BY THE INVESTIGATING OFFICER THAT NONACADEMIC MISCONDUCT OCCURRED. (a) If, as a result of a discussion under sub. (1), the investigating officer determines that nonacademic misconduct did occur and that one or more of the disciplinary sanctions listed under s. UWS 17.04(1) should be recommended, the investigating officer shall prepare a written report so informing the student, which shall contain the following:

1. A description of the misconduct;
2. Specification of the sanction sought;
3. Notice of the student's right to a hearing before the nonacademic misconduct hearing committee; and
4. A copy of this chapter and of the institutional procedures adopted to implement this section.

(b) The written report shall be delivered personally to the student or be mailed to the student by regular first class United States mail at his or her current address, as maintained at the institution.

(c) A student who receives a written report under this section has the right to a hearing before the nonacademic misconduct hearing committee under s. UWS 17.06 to contest the determination that nonacademic misconduct occurred, or the choice of disciplinary sanction, or both.

1. Where the disciplinary sanction sought is one of those listed in s. UWS 17.04(1)(a) through (f), and the student desires the hearing before the nonacademic misconduct hearing committee, the student must file a written request with the student affairs officer within 10 days of personal delivery or mailing of the written report. If the student does not request a hearing within this period, the determination of nonacademic misconduct shall be regarded as final, and the disciplinary sanction sought shall be imposed.

2. Where the disciplinary sanction sought is suspension or expulsion under s. UWS 17.04(1)(g) or (h), the investigating officer shall forward a copy of the written report under par. (b) to the student affairs

officer. The student affairs officer shall, upon receipt of the written report, proceed under s. UWS 17.06, to schedule a hearing on the matter. A hearing will be conducted unless the student waives, in writing, the right to such a hearing.

**History:** Cr. Register, May 1996, No. 485, eff., 9-1-96.

**UWS 17.06 Hearing. (1)** If a student requests a hearing, or a hearing is required to be scheduled under s. UWS 17.05(3)(c)2, the student affairs officer shall take the necessary steps to convene the nonacademic misconduct hearing committee or have a hearing examiner designated, and shall schedule the hearing within 15 days of receipt of the request or written report. The hearing shall be conducted within 45 days of receipt of the request or written report, unless a different time period is mutually agreed upon by the student and investigating officer, or is ordered or permitted by the committee.

**(2)** A student who requests a hearing, or for whom a hearing is scheduled under s. UWS 17.05(3)(c)2, shall have the right to decide whether the matter will be heard by a hearing committee or a hearing examiner.

**(3)** Reasonably in advance of the hearing, the committee shall obtain from the investigating officer, in writing, a full explanation of the facts upon which the determination of misconduct was based, and shall provide the student with access to or copies of the investigating officer's explanation, together with any other materials provided to the committee by the investigating officer.

**(4)** The hearing before the nonacademic misconduct hearing committee shall be conducted in accordance with the following requirements:

(a) The student shall have the right to question adverse witnesses, the right to present evidence and witnesses, and to be heard in his or her own behalf, and the right to be represented by an individual of his or her choice, at his or her own expense.

(b) The committee shall not be bound by common law or statutory rules of evidence and may admit evidence having reasonable probative value, but shall exclude immaterial, irrelevant, or unduly repetitious testimony, and shall observe recognized legal privileges.

(c) The committee shall make a record of the hearing. The record shall include a verbatim record of the testimony, which may be a sound recording, and a file of the exhibits offered at the hearing. Any party to the hearing may obtain copies of the record at his or her own expense. Upon a showing of indigency and legal need, a party may be provided a copy of the verbatim testimony without charge.

(d) The committee shall prepare written findings of fact and a written statement of its decision based upon the record of the hearing.

(e) The committee may find nonacademic misconduct and impose a sanction of suspension or expulsion only if the proof of such misconduct is clear and convincing. In other cases, proof of the misconduct must be established by a preponderance of the credible evidence.

(f) The committee may impose one or more of the disciplinary sanctions listed in s. UWS 17.04(1)(a) through (f) that differs from the recommendation of the investigating officer. Suspension or expulsion under s. UWS 17.04(1)(g) and (h) may not be imposed unless recommended by the investigating officer.

(g) The investigating officer or another institutional representative shall present the case against the student. The investigating officer may be a witness at the hearing conducted by the committee, but does not have responsibility for conducting the hearing.

(h) The decision of the hearing committee shall be prepared within 10 days of the hearing, and served upon the student either by personal delivery or by first class United States mail to his or her current address as maintained by the institution. The decision shall become final within 10 days of personal delivery or mailing, unless an appeal is taken under s. UWS 17.07.

(i) Failure of a party to appear at a scheduled hearing and proceed shall constitute *default*. The committee may either dismiss the case, or, upon a prima facie showing, find that the student committed the misconduct alleged.

(j) Hearings to receive evidence or hear argument shall be public unless the student whose case is being heard requests a closed hearing or the committee determines that it is necessary to hold a closed hearing for a reason specified under s. 19.85, Wis. Stats. The deliberations of the committee shall not be public.

**History:** Cr. Register, May 1996, No. 485, eff., 9-1-96.

**UWS 17.07 Appeal to the Chancellor.** **(1)** Where the sanction prescribed by the hearing committee is suspension or expulsion, the student may appeal to the chancellor to review the decision of the hearing committee based upon the record. In such a case, the chancellor shall sustain the decision of the nonacademic misconduct hearing committee unless the chancellor finds:

(a) The evidence of record does not support the findings or recommendations of the hearing committee;

(b) Established procedures were not followed by the nonacademic misconduct hearing committee and material prejudice to the student resulted; or

(c) The decision was based on factors proscribed by state or federal law regarding equal educational opportunities.

**(2)** If the chancellor makes a finding under sub. (1), the chancellor may remand the matter for consideration by a different hearing committee, or, in the alternative, may invoke an appropriate remedy of his or her own.

**History:** Cr. Register, May 1996, No. 485, eff., 9-1-96.

**UWS 17.08 Discretionary Appeal to the Board of Regents.** Institutional decisions under ss. UWS 17.05 through 17.07 shall be final, except that the board of regents may, at its discretion, grant a review upon the record.

**History:** Cr. Register, May 1996, No. 485, eff., 9-1-96.

**UWS 17.09 Settlement.** The procedures set forth in this chapter do not preclude a student from agreeing that nonacademic misconduct occurred and to the imposition of a sanction, or to other terms or conditions, after proper notice has been given. Any such agreement shall be reduced to writing which, when signed by the student, shall conclude the case.

**History:** Cr. Register, May 1996, No. 485, eff., 9-1-96.

**UWS 17.10 Effect of Discipline Within the Institution.** Students who are, at the time of commencement, subject to a disciplinary sanction under s. UWS 17.04(1)(d) through (f), or who are under charges as a result of a report under s. UWS 17.05(3)(c)2 that could lead to suspension or expulsion, shall not be awarded degrees during the pendency of the sanction or disciplinary proceeding.

**History:** Cr. Register, May 1996, No. 485, eff., 9-1-96.

**UWS 17.11 Effect of Discipline within the University System.** Suspension or expulsion shall be system wide in effect.

**(1)** A student who is suspended or expelled from one institution in the university of Wisconsin system may not enroll in another institution in the system unless the suspension has expired by its own terms or one year has elapsed after the student has been suspended or expelled.

**(2)** No person who is in a state of suspension or expulsion from the university under this chapter, or who takes leave or resigns under charges after being charged by the university under this chapter, may enter any campus without the written consent of the chief administrative officer.

**(3)** Upon completion of a suspension period, a student who is academically eligible may re-enroll in the institution which suspended him or her as if no suspension had been imposed.

**History:** Cr. Register, May 1996, No. 485, eff., 9-1-96.

**UWS 17.12 Right to Petition for Readmission.** A student who has been expelled may petition for readmission, and a student who has been suspended may petition for readmission prior to the expiration of the suspension period. The petition for readmission must be in writing and directed to the chancellor of the institution from which the student was suspended or expelled. The petition may not be filed before the expiration of one year from the date of the final determination in expulsion cases, or before the expiration of one-half of the suspension period in suspension cases. The chancellor shall, after consultation with elected representatives of the faculty, academic staff, and students, adopt procedures for determining whether such petitions will be granted or denied.

**History:** Cr. Register, May 1996, No. 485, eff., 9-1-96.

**UWS 17.13 Designation of Investigating Officer.** The chancellor of each institution shall designate an investigating officer or officers for allegations of student nonacademic misconduct. The investigating officer shall have responsibility for investigating student nonacademic misconduct and initiating procedures for nonacademic misconduct under s. UWS 17.05.

**History:** Cr. Register, May 1996, No. 485, eff., 9-1-96.

**UWS 17.14 Nonacademic Misconduct Hearing Committee: Institutional Option.** The chancellor of each institution, in consultation with faculty, academic staff, and student representatives, shall adopt policies providing for the establishment of a student nonacademic misconduct hearing committee and designation of a hearing examiner to fulfill the responsibilities of the nonacademic misconduct hearing committee in this chapter.

**(1)** A student nonacademic misconduct hearing committee shall consist of at least 3 persons, including a student or students, and the presiding officer shall be appointed by the chancellor. The presiding officer and at least one other member shall constitute a quorum at any hearing held pursuant to due notice.

**(2)** A hearing examiner shall be selected by the chancellor from the faculty and staff of the institution.

**History:** Cr. Register, May 1996, No. 485, eff., 9-1-96.

**UWS 17.15 Notice to Students.** Each institution shall publish and make freely available to students copies of ch. UWS 17 and any institutional policies implementing ch. UWS 17.

**History:** Cr. Register, May 1996, No. 485, eff., 9-1-96.

**UWS 17.16 Consistent Institutional Policies.** Each institution is authorized to adopt policies consistent with this chapter. A copy of such policies shall be filed with the board of regents and the university of Wisconsin system office of academic affairs.

**History:** Cr. Register, May 1996, No. 485, eff., 9-1-96.

**UWS 17.17 Emergency Suspension.** A student may be temporarily suspended, pending final institutional action on a report of nonacademic misconduct, in accordance with the procedures of this section.

**(1)** The chancellor of each institution is authorized to suspend a student temporarily where the investigating officer has offered the student the opportunity for discussion under s. UWS 17.05(1); and the investigating officer recommends a sanction of suspension or expulsion; and the chancellor determines that the student's continued presence on campus:

(a) Would constitute a potential for serious harm to himself or herself;

(b) Would constitute a potential for serious harm to other members of the university community;

(c) Would pose a threat of serious disruption of university-run or university-authorized activities; or

(d) Would constitute a potential for serious harm to university facilities or property.

**(2)** Before imposing a temporary suspension, the chancellor must evaluate the information indicating that the conditions specified in par. (1) are present. If the chancellor concludes, based on the available information, that these conditions are present and that a temporary suspension is warranted, he or she shall promptly notify the student in writing, either by personal delivery or by regular first class United States mail at his or her current address as maintained at the institution, of the intent to impose a temporary suspension, and shall provide the student with an opportunity to be heard in response.

**(3)** The hearing on the temporary suspension shall be held as soon as practicable after the student is notified of the intent to impose the temporary suspension.

**(4)** The issue at the hearing on the temporary suspension shall be whether the conditions specified in par. (1) are present, and a temporary suspension is warranted.

**(5)** The chancellor's decision may be rendered orally, but must be confirmed in writing as soon as practicable after the hearing, with written notice provided to the student either delivered personally, or by regular first class United States mail at his or her current address, as maintained at the institution.

**(6)** If the chancellor determines that the conditions specified in par. (1) are not present, or that a temporary suspension is not warranted, the case shall proceed in accordance with s. UWS 17.06. If the chancellor determines that the conditions specified in par. (1) are present, and a temporary suspension is warranted, the temporary suspension shall be in effect pending the final institutional decision in the matter.

**(7)** Where a temporary suspension is imposed, the hearing on the underlying allegations of misconduct must be held within 21 days of the imposition of the temporary suspension, unless the student agrees to a later date. In no case, however, shall a temporary suspension remain in effect for longer than 30 days, unless the student agrees to a longer period.

**(8)** The chancellor's decision to impose a temporary suspension in accordance with this section shall be final.

**History:** Cr. Register, May 1996, No. 485, eff., 9-1-96.

# Colgate University

## University Student Disciplinary System

☐ University Code of Student Conduct
☐ Procedures of the University Student Disciplinary System
☐ Sexual Misconduct Hearing

### University Code of Student Conduct

Students at Colgate University accept membership in an academic community dedicated to the pursuit of intellectual and personal growth. As a liberal arts college, Colgate seeks to provide opportunities for students, both in and outside the classroom, to develop critical thinking, integrity, judgment, a common experience of learning, appreciation of cultural and ethnic diversity, as well as the social and ethical values necessary for community life.

Colgate expects its students to conduct themselves in a manner which is consistent with the institutional community's pursuit of its educational objectives. The integrity of the Colgate community depends upon each member's acceptance of individual responsibility and respect for the rights of others. Colgate expects that its students will not lie, steal, cheat, engage in dishonest or unlawful behavior or any other behavior intended to inflict physical or emotional harm on another person. Colgate students must abide by University policies and comply with directions of University officials acting in performance of their duties.

### Student Discipline

The University student disciplinary system resolves possible violations of the Code of Student Conduct by matriculated or enrolled Colgate students on or off campus. The disciplinary system seeks to educate students so that they understand both personal freedoms and the limits of belonging to and living in a diverse academic community.

When possible violations of the University Code of Student Conduct are brought to the attention of the Disciplinary Officer, appointed by the Dean of the College, the student concerned is informed of the possible violation and is given an opportunity to respond. If it is determined that the violation has occurred, disciplinary action will be taken. Students will ordinarily be given an opportunity to appeal disciplinary actions.

The By-Laws of the Board of Trustees assign responsibility for discipline to the President of the University. Student disciplinary matters are delegated to the Disciplinary Officer. If circumstances warrant, the Disciplinary Officer may delegate certain disciplinary responsibilities to other members of the Dean of the College staff. The President may become involved in any student disciplinary matter either at the request of the Disciplinary Officer or when, in the President's judgment, the best interests of the University are involved. The President will review all cases in which there is a sanction of expulsion from the University.

The University's disciplinary system is not a substitute for civil or criminal court proceedings. Students on campus as well as off campus are subject to federal, state and local laws.

Please note: A Colgate off-campus study group director serves as the Disciplinary Officer for the students enrolled in that group and in cases other than academic dishonesty is authorized to resolve questions of student conduct through alternative procedures. Cases of academic dishonesty will be referred to a Disciplinary Board hearing upon the student's return to campus.

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## *Procedures*

### Referral to Hearing Body

When possible violations of the Code of Student Conduct have been reported to the Disciplinary Officer, the Disciplinary Officer meets with the individual(s) involved in the possible violation and to determine what course of action should be taken. Ordinarily, possible violations will be referred to an appropriate hearing body. However, the Disciplinary Officer may determine to resolve a question of student conduct through alternative procedures.

### Hearing Bodies

1. Administrative Hearing with the Disciplinary Officer Sanctions short of suspension or expulsion for violations of the Code of Conduct that occur outside the residential system and are admitted to by the student will be imposed by the Disciplinary Officer after an Administrative Hearing.
2. A. University Student Disciplinary Board Hearing
   The Disciplinary Officer will refer to the University Student Disciplinary Board (1) cases involving possible violations of the Code of Conduct that could result in a sanction of suspension or expulsion, (2) cases in which the student involved does not accept responsibility for the violation and (3) cases of academic dishonesty.
   B. Sexual Misconduct Board Hearing
   The Disciplinary Officer will refer to the University Sexual Misconduct Board cases involving possible violations of the University's Sexual Misconduct or Sexual Harassment policies that could result in suspension or expulsion or for which the student does not accept responsibility. For information regarding this disciplinary process, please see the section in the *Student Handbook* titled Sexual Misconduct Hearing.
3. Residential Life Administrative and Board Hearings
   The Residential Life Disciplinary System resolves possible violations of University Housing regulations that occur within University owned housing. For information regarding this disciplinary process, please see the section in the *Student Handbook* titled Residential Life Disciplinary System.

### Administrative Hearings

The student will be contacted regarding a possible violation and will be required to meet with the Disciplinary Officer by a specified date. The student then will be given the opportunity to respond to the possible violation and to discuss the violation with the Disciplinary Officer. If the student admits to the violation, the Disciplinary Officer will assign a sanction. There are no appeals from Administrative Hearings.

### University Student Disciplinary Board

The University Student Disciplinary Board determines whether matriculated or enrolled students on or off campus have violated the University Code of Student Conduct and, if so, what action should be taken.

Each Board is composed of seven persons: three students, two faculty, one administrator and the Disciplinary Officer, who serves as the chair. A quorum of the hearing Board consists of four persons, with at least one student and one faculty plus the Disciplinary Officer. In the absence of a quorum, the hearing will be rescheduled.

The University Student Disciplinary Board is drawn from a pool of eighteen members in addition to the Disciplinary Officer: nine students, six faculty and three administrators. Faculty members are elected by the faculty; student members are appointed by the Student

Senate. Faculty terms are three years; students serve for one year. Administrators are appointed by the Dean of the College. Students must have completed at least two terms at Colgate before serving on the Board. No member of the Board may be an attorney.

At least seven (7) days prior to the hearing, or if an accelerated hearing is scheduled as far in advance as possible, the Disciplinary Officer shall send a letter to the student stating the following:

1. A specific description of the possible violation(s).
2. The time and location of the hearing and a reminder that attendance is mandatory, superseding all other campus activities. If the student does not appear at the scheduled hearing, the hearing will be held *in absentia*. In unusual circumstances, the chair may reschedule the hearing, if in his/her judgment the student had a legitimate reason for not appearing.
3. Hearings shall be scheduled as soon as it is possible. Possible violations which occur near or after the end of an academic term will be held immediately after the end of the term or during the Summer as outlined in the section titled Hearing when College is not in session.
4. Both the student whose behavior is in question and the person, if any, initiating the action are entitled to the assistance of an advisor at the hearing. An advisor must be chosen from among current students, faculty, staff or administrators at Colgate University. The advisor may not be an attorney. It is always expected that the student appearing at the hearing will speak and respond to questions on his/her own behalf. The advisor may consult with the advisee but may not speak on behalf of the advisee, unless he/she is directed to answer questions raised by the Board members.

## The Hearing

1. Ordinarily only the person(s) directly involved in the incident are allowed to attend the entire hearing; there will be no observers. However, the chair may allow individuals who have direct knowledge of the behavior in question to appear at a portion of the hearing in order to respond to specific questions from the Board or the persons involved. The Board does not hear character witnesses but will accept up to two letters supporting the character of the student involved. Proceedings are strictly confidential. All persons present at any time during the hearing are expected to maintain confidentiality.
2. In meetings concerning academic dishonesty, no question may be posed concerning (1) the faculty member's motive for bringing the matter forward, (2) other incidents that the faculty member has brought or not brought forward or (3) the dishonesty of other classmates who were not brought to the hearing. At the beginning of all academic dishonesty hearings, the chair will review these rules for the benefit of all involved.
3. Only information pertinent to the possible violation will be considered by the Board. However, information about previous student disciplinary actions or civil or criminal convictions may be introduced at these hearings if, in the judgment of the chair, this information bears directly on the possible violation.
4. Hearings are tape recorded. The tape shall be made available to Board members; the student whose behavior was in question; the persons, if any, who initiated the action; and appropriate administrative officers of the University. Persons given access to the tape will be required to sign an agreement confirming that they will protect the confidentiality of the hearing.

## Decisions

The Board shall deliberate in closed session to determine whether a student is responsible or not responsible for the violation(s) in question. If a student is found responsible, appropriate sanctions will be assessed by the Board. The deliberations of the Board shall be kept in strict confidence. Decisions shall be determined by a majority vote of the members of the Board minus the chair. In the event of a tie vote, there will be a finding of no decision and no sanction will be assessed.

The chair shall forward a written decision to the student involved as soon as possible including, if applicable, sanctions. In academic dishonesty cases, a copy of the Board's decision shall be sent to the faculty member who initiated the action.

## *Sanctions*

The following are the usual sanctions which may be imposed upon students singly or in combination:

1. *Warning:* A formal statement for a specified time that the student's behavior was unacceptable and a warning that further infractions of any institutional regulation will result in more severe disciplinary action.
2. *Probation:* A written reprimand for violation of the Code of Conduct, providing for more severe disciplinary sanctions in the event the student is found in violation of any University regulation within a specified period of time, but not beyond graduation from Colgate. Terms of the probation shall be specified and may include denial of specified social privileges, exclusion from co-curricular activities, and other measures deemed appropriate.
3. *Suspension:* Termination of student status for a definite period of time not to exceed two years, or until specific criteria are met.
4. *Expulsion:* Permanent termination of student status.
5. *Other Actions:* In addition to or in place of the above sanctions, the Disciplinary Board or the Administrative Hearing Officer may assign such other actions as it deems appropriate, including but not limited to the following:
   a. Mandated counseling so the student has the opportunity to gain more insight into his/her behavior.
   b. Apology: Requiring the student to write a letter of apology to those involved.
   c. Community Service: Requiring unpaid service to the University or area community stated in terms of type and hours of service.
   d. Restitution: Reimbursement for damage to or misappropriation of property, or for personal injury and other related costs.
   e. Denial of University Housing: Exclusion from permission to live in University Housing for a stated period of time.

Note: In cases of academic dishonesty, the sanctions shall be:

1. For first offenses -failure in the course and either warning or probation.
   or
   failure in the course and suspension.
2. For second offenses -failure in the course and suspension or expulsion.

## *Interim Suspension*

If it appears to the Disciplinary Officer that the safety or well-being of anyone in the Colgate community may be jeopardized by the presence on campus of the student whose behavior is in question, the Disciplinary Officer may suspend the student pending a decision by the Student Disciplinary Board and subsequent appeals. The Disciplinary Officer may also suspend a student pending disposition of a civil or criminal court action involving Colgate students. Conduct involving acts of violence, sexual or physical abuse, use of weapons or behavior described in "Public Order" or "Policy on Drugs" section of the *Student Handbook* are examples of situations in which interim suspension may be expected. In all cases in which an interim suspension is imposed, the student will be given the opportunity to meet with the Disciplinary Officer prior to or just after such suspension is imposed.

## *Appeal*

In the event that a student admits having violated the Code of Student Conduct and has a sanction imposed by the Disciplinary Officer, there is no appeal.

In the event that the incident goes before a Student Disciplinary Board, a request for an appeal may be made in writing to the Dean of the College. The request must be submitted within seven (7) days after notification of the decision of the hearing Board, unless the request for an appeal is based upon new information (see number 2 below) that has become known only after the seven days have elapsed. A request for an appeal may only be submitted based on evidence of one of the following:

1. A procedural error occurred during the process which had a direct impact on the outcome.
2. New information has come to light which has a direct impact on the outcome.

After receiving the written request for an appeal, the Dean of the College may:

1. Deny the request for an appeal.
2. Accept the appeal and ask the original hearing body to reconvene unless the basis for an appeal requires new hearing members. In this case a new meeting will be held by another hearing body.

While the appeal is pending, the sanctions imposed will remain in effect until they are officially changed through the appeal process.

## *Records*

The Disciplinary Officer will issue monthly a public statement including all decisions for which the appeal period has expired. The statement will not include any student names. It will include a brief explanation of the behaviors brought into question, the decisions, the sanctions, if any, and comments if needed. A record of the public statements will be kept in the Disciplinary Officer's office.

For the benefit of the Board, a set of records of all prior meetings will be kept by the Disciplinary Officer. The record will include more detailed accounts of the meetings to assist the Board in imposing sanctions.

With the exception of expulsion, disciplinary sanctions shall not be recorded on a student's academic transcript. In the case of expulsion, the student's academic transcript shall be annotated with the statement: "Expelled for disciplinary reasons (date)." Students should review the University's Policy on Recommendations for more information about disclosure of disciplinary records.

## *Hearing When Collge is not in Session*

If a hearing needs to be held at or after the end of the semester and the regular Student Disciplinary Board can not be convened, the Disciplinary Officer may convene a Special Disciplinary Board. The membership will consist of members available at the time of the hearing, with a quorum of four, including at least one student and one faculty member and the Disciplinary Officer acting as Chair. The Chair is not a voting member. In the case of an appeal, the same procedures will be followed as during the regular sessions. All actions will be taken during the break, unless the appeal requires the reconvening of a board. In this case every effort will be made to resolve the matter during the break, but if it is not possible to reconvene everyone needed, the hearing will be postponed until the beginning of the next semester.

## *Action in Courts*

The Disciplinary Officer will seek to monitor civil or criminal court cases involving Colgate students where serious breaches of the law are involved. The University may delay disciplinary action until the court action is completed. The University reserves the right, however, to initiate disciplinary action while court action is pending.

## *Amendments*

Amendments to this system shall be proposed by the Committee on Students Rights and Responsibilities and acted upon by the Student Affairs Board. The Student Affairs Board shall refer proposed amendments to the President and the Board of Trustees for final approval.

## *Sexual Misconduct Hearing*

The Disciplinary Officer will refer to the University Sexual Misconduct Board cases involving possible violations of the University's Sexual Misconduct or Sexual Harassment policies that could result in suspension or expulsion or for which the student does not accept responsibility.

The Sexual Misconduct Board is composed of four persons: three faculty and administration members selected from the University Student Disciplinary Board and the Disciplinary Officer, who serves as chair. Students do not hear such cases. At least one of the faculty and administration members shall be male and at least one shall be female.

At least seven (7) days prior to the hearing, or if an accelerated hearing is scheduled, as far in advance as possible, the Disciplinary Officer shall send in writing a letter to the student whose behavior is in question, stating the following:

1. A specific description of the possible violation.

2. The time and location of the hearing and a reminder that attendance is mandatory, superseding all other campus activities. If the student does not appear at the scheduled hearing, the hearing will be held *in absentia*. In unusual circumstances, the hearing may be rescheduled if the chair determines that the student had a legitimate reason for not appearing.

3. In the event the Disciplinary Officer receives a report on a possible violation near or after the end of an academic term the hearing will be held immediately after the end of the term or during the summer as outlined in the section, "Hearings When College is Not in Session".

4. Both the student whose behavior is in question and the person, if any, initiating the action are entitled to the assistance of an advisor at the hearing. An advisor must be chosen from among current students, faculty, staff or administrators at Colgate University; the advisor may not be an attorney. It is always expected that the students appearing at the hearing will speak and respond to questions on his/her own behalf. Although the advisor may consult with the student, he/she may not speak on behalf of the student, unless directed to answer questions raised by the Board members.

## The Hearing

1A. Unless the Disciplinary Officer determines it is appropriate in accordance with paragraph 1B, no one shall present evidence or raise questions concerning: (1) incidents not directly related to the possible violation or (2) the sexual history of or the character of the person who believes she/he is a victim of sexual misconduct.

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1B. In those instances where the student believes such evidence is relevant, the student must submit a narrative of that evidence and an explanation of its relevance to the case in a written statement to the Disciplinary Officer at least seventy-two hours prior to the hearing. The Disciplinary Officer shall inform the student involved either prior to or at the commencement of the hearing whether such evidence may be admitted as part of the hearing.

Information about previous student disciplinary actions or civil or criminal convictions may be introduced at the hearing if, in the judgment of the chair, the information bears directly on the possible violation.

2. Ordinarily only the person(s) directly involved in the incident are allowed to attend the entire hearing; there will be no observers. However, the chair may allow individuals who have direct knowledge of the behavior in question to appear at a portion of the hearing in order to respond to specific questions from the Board or the persons involved.

3. Hearings are tape recorded. The tape shall be made available to hearing Board members, the student whose behavior was in question, the student, if any, who initiated the action, and appropriate administrative officers of the university. Persons given access to the tape will be required to sign an agreement confirming that they will protect the confidentiality of the hearing.

4. At the conclusion of the hearing, the student involved may make a final statement.

## Decision

The Board shall deliberate in closed session to determine whether a student is responsible for violations in question. If a student is found responsible, appropriate sanctions will be assessed by the Board. The deliberations of the Board shall be kept in strict confidence. Decisions shall be determined by a majority vote of the members of the Board minus the chair.

The chair shall forward a written decision to the student involved as soon as possible including, if applicable, the sanctions assessed.

## Sanctions

All sanctions outlined in the University Student Disciplinary System are available to the Sexual Misconduct Board. In the most serious cases, the usual sanction is suspension or expulsion.

## Appeal

Refer to the appeal process as outlined in the Student Disciplinary System for more information.

## Records

Refer to records section as described in the Student Disciplinary System for more information.

# UNIVERSITY OF NEW MEXICO

## STUDENT CODE OF CONDUCT

**Adopted by the UNM Regents April 14,1992**
**Revision approved by the Regents May 12, 1995**

It is important for all students to be aware of conduct that will lead to disciplinary action by the University. In order to clarify the types of conduct which shall be considered to affect adversely the University's educational function, to disrupt community living on campus, or to interfere with the rights of others to pursue their education, to conduct their University duties and responsibilities or to participate in University activities, the Board of Regents hereby adopts the following Code of Conduct for students:

### 1. SCOPE

The University may take disciplinary action for an offense against the Code of Conduct when the offense occurs on University premises or at University-sponsored events, or when an offense which occurs off campus is such that in the judgment of the Dean of Students,[1] failure to take disciplinary action is likely to interfere with the educational process or the orderly operation of the University, or endanger the health, safety or welfare of the University community.

The term "student" includes both full-time and part-time students pursuing undergraduate, graduate or professional studies.

### 2. MATTERS SUBJECT TO DISCIPLINARY ACTION

Appropriate disciplinary procedures and sanctions shall be applied to any student who commits, or attempts to commit, any of the following acts of misconduct:

2.1. Actions which have great potential for physically harming the person or property of others, including that of the University, or which actually result in physical harm, or which cause reasonable apprehension of physical harm.

2.2. Any type of sexual assault including rape.

2.3. Making false representations to the University, including forgery and unauthorized alteration of documents; unauthorized use of any University document or instrument of identification.

2.4. Academic dishonesty, including, but not limited to, dishonesty in quizzes, tests, or assignments; claiming credit for work not done or done by others; hindering the academic work of other students; misrepresenting academic or professional qualifications within or without the

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[1] All references to University officers, by title, in this Code shall also include the designee(s) of that officer.

University; and nondisclosure or misrepresentation in filling out applications or other University records.

2.5. Substantially interfering with the freedom of expression, movement or activity of others.

2.6. Initiating or causing to be initiated any false report, warning or threat of fire, explosion or other emergency. Misusing or damaging fire safety equipment on University premises.

2.7. Theft of property or of services. Possession of property that is known to be stolen.

2.8. Failure to comply with the lawful directions of University officials, including campus police officers and other law enforcement officials, acting in performance of their duties.

2.9. Willfully refusing or failing to leave the property of or any building or other facility owned, operated, or controlled by the University when requested to do so by a lawful custodian of the building, facility or property if the person is committing, threatens to commit or incites others to commit any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions of the University.

2.10. Unauthorized presence in or use of University premises, facilities or property, in violation of posted signs, when closed, or after normal operating hours.

2.11. Illegal use, possession, or distribution of any controlled substance, illegal drug or alcohol.

2.12. Use or possession of fireworks on University premises or at University-sponsored events, unless expressly authorized in writing by the President.

2.13. Use, possession or storage of any weapon on University premises or at University-sponsored activities, unless expressly authorized in writing by the President. Weapon includes, but is not limited to, firearms, ammunition, bombs, explosives, incendiary devices, or other dangerous weapons, substances or materials.

2.14. Misusing University computing resources by intentionally making or receiving, accessing, altering, using, providing or in any way tampering with files, disks, programs, passwords or hardware belonging to other computer users without their permission.

2.15. Violation of published or posted University regulations or policies, including but not limited to regulations prohibiting discriminatory activity.

2.16. Aid to others in committing or inciting others to commit any act mentioned above.

2.17. Action(s) or conduct which hinders, obstructs or otherwise interferes with the implementation or enforcement of the Code of Conduct including failure to appear before any of the University's disciplinary authorities and to testify as a witness when reasonably notified to do so by an appropriate University officer.

2.18. Any other acts or omissions which affect adversely University functions or University-sponsored activities, disrupt community living on campus, interfere with the rights of others to the pursuit of their education, or otherwise affect adversely the processes of the University.

2.19. Violating the terms of any disciplinary sanction imposed in accordance with this Code.

### 3. RIGHTS OF STUDENTS IN DISCIPLINARY MATTERS

Students' rights under the state and federal constitutions are specifically acknowledged and affirmed, including the rights of freedom of speech, freedom of association, freedom of religion, and due process. The provisions of this Code of Conduct shall be construed so as not to infringe upon these rights, as those rights are defined by law.

## 4. SANCTIONS

4.1. Any student who violates any of the rules set forth in Section 3 above, shall be subject to warning (verbal or written), disciplinary probation, suspension, expulsion, dismissal from University employment, or being barred from campus. Student sanctions imposed under this Code of Conduct shall be imposed pursuant to the Student Standards & Grievance Procedure, or its successor.

4.2. As used in this subsection:

4.2.1. "Verbal warning" means an oral reprimand.

4.2.2. "Written warning" means a written reprimand.

4.2.3. "Disciplinary probation" means the establishment of a time period during which further acts of misconduct may or will result in more severe disciplinary sanctions depending on the conditions of the probation. Conditions of probation can include community service, attendance at workshops and/or seminars including but not limited to alcohol, drug or safety workshops and/or seminars, mandatory mental health evaluation and/or counseling or other educational sanctions.

4.2.4. "Suspension" means losing student status for a period of time specified in the terms of the suspension. A suspension may commence immediately upon a finding of a violation or it may be deferred to a later time.

4.2.5. "Expulsion" means losing student status for an indefinite period of time. Readmission may not be sought before the expiration of two years from the date of expulsion, and it is not guaranteed even after that time.

4.2.6. "Dismissal"means termination of student employment, either for a stated time period or indefinitely.

4.2.7. "Barred from campus" means being barred from all or designated portions of the University property or activities.

4.3. The sanction imposed shall be set based upon numerous factors, including the severity of the offense, the amount of harm created, the student's record, and sanctions imposed in recent years for similar offenses. In considering the harm created, there shall be taken into account whether any harm or injury was targeted against a person or group because of that person or group's race, color, religion, national origin, physical or mental handicap, age, sex, sexual preference, ancestry, or medical condition.

## 5. IMPLEMENTATION

The President of the University may adopt such procedures, rules or regulations as deemed necessary to implement this Code of Conduct.

# II. SELECTED CODES AND POLICIES -- ACADEMIC

1. University of Wisconsin System

2. Colgate University

3. State of Florida, Department of Education Division of Universities -- Florida State University

4. Rutgers, The State University of New Jersey

University of Wisconsin System

# Chapter UWS 14

## STUDENT ACADEMIC DISCIPLINARY PROCEDURES

UWS 14.01 Statement of principles
UWS 14.02 Definitions
UWS 14.03 Academic misconduct subject to disciplinary action
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UWS 14.05 Procedures: disciplinary sanction imposed at the discretion of the instructor
UWS 14.06 Procedures: disciplinary sanction imposed following a report of academic misconduct by the instructor
UWS 14.07 Procedures: disciplinary sanction imposed following a report of academic misconduct by the investigating officer
UWS 14.08 Procedures: hearing
UWS 14.09 Appeal to the Chancellor
UWS 14.10 Discretionary appeal to the Board of Regents
UWS 14.11 Settlement
UWS 14.12 Effect of discipline within the university system
UWS 14.13 Right to petition for readmission
UWS 14.14 Investigating officer
UWS 14.15 Academic misconduct hearing committee: institutional option
UWS 14.16 Notice to students
UWS 14.17 Notice to instructors
UWS 14.18 Consistent institutional policies

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## UWS 14 -- STUDENT ACADEMIC DISCIPLINARY PROCEDURES

(Note: See ch. UWS 17 for rules on student nonacademic disciplinary procedures)

**UWS 14.01 Statement of Principles.** The board of regents, administrators, faculty, academic staff and students of the university of Wisconsin system believe that academic honesty and integrity are fundamental to the mission of higher education and of the university of Wisconsin system. The university has a responsibility to promote academic honesty and integrity and to develop procedures to deal effectively with instances of academic dishonesty. Students are responsible for the honest completion and representation of their work, for the appropriate citation of sources, and for respect of others' academic endeavors. Students who violate these standards must be confronted and must accept the consequences of their actions.

**History:** Cr. Register, February 1989, No. 398, eff., 3-1-89

**UWS 14.02 Definitions.** In this chapter:

**(1)** "Academic misconduct" means an act described in s. UWS 14.03.

**(2)** "Academic misconduct hearing committee" means the committee or hearing examiner appointed pursuant to s. UWS 14.15 to conduct hearings under s. UWS 14.08.

**(3)** "Chancellor" means the chancellor or designee.

**(4)** "Days" means calendar days.

**(5)** "Disciplinary file" means the record maintained by the student affairs officer responsible for student discipline.

**(6)** "Disciplinary probation" means a status in which a student may remain enrolled in the university only upon the condition that the student complies with specified standards of conduct for a specified period of time, not to exceed 2 semesters.

**(7)** "Disciplinary sanction" means any action listed in s. UWS 14.04 taken in response to student academic misconduct.

**(8)** "Expulsion" means termination of student status with resultant loss of all student rights and privileges.

**(9)** "Hearing examiner" means an individual appointed by the chancellor in accordance with s. UWS 14.15 for the purpose of conducting a hearing under s. UWS 14.08.

**(10)** "Institution" means any university or center, or organizational equivalent designated by the board.

**(11)** "Instructor" means the faculty member or instructional academic staff member who has responsibility for the overall conduct of a course and ultimate responsibility for the assignment of the grade for the course.

**(12)** "Investigating officer" means an individual, or his or her designee, appointed by the chancellor of each institution to carry out certain responsibilities in the course of investigations of academic misconduct under this chapter.

**(13)** "Student" means any person who is registered for study in an institution for the academic period in which the misconduct occurred.

**(14)** "Student affairs officer" means the dean of students or student affairs officer designated by the chancellor to carry out duties described in this chapter.

**(15)** "Suspension" means a loss of student status for a specified length of time, not to exceed two years, with resultant loss of all student rights and privileges.

**History:** Cr. Register, February 1989, No. 398, eff., 3-1-89

**UWS 14.03 Academic Misconduct Subject to Disciplinary Action.** **(1)** Academic misconduct is an act in which a student:

(a) Seeks to claim credit for the work or efforts of another without authorization or citation;

(b) Uses unauthorized materials or fabricated data in any academic exercise;

(c) Forges or falsifies academic documents or records;

(d) Intentionally impedes or damages the academic work of others;

(e) Engages in conduct aimed at making false representation of a student's academic performance; or

(f) Assists other students in any of these acts.

**(2)** Examples of academic misconduct include, but are not limited to: cheating on an examination; collaborating with others in work to be presented, contrary to the stated rules of the course; submitting a paper or assignment as one's own work when a part or all of the paper or assignment is the work of another; submitting a paper or assignment that contains ideas or research of others without appropriately identifying the sources of those ideas; stealing examinations or course materials; submitting, if contrary to the rules of a course, work previously presented in another course; tampering with the laboratory experiment or computer program of another student; knowingly and intentionally assisting another student in any of the above, including assistance in an arrangement whereby any work, classroom performance, examination or other activity is submitted or performed by a person other than the student under whose name the work is submitted or performed.

**History:** Cr. Register, February 1989, No. 398, eff., 3-1-89

**UWS 14.04 Disciplinary Sanctions.** **(1)** The following are the disciplinary sanctions that may be imposed for academic misconduct in accordance with the procedures of ss. UWS 14.05, 14.06 or 14.07:

(a) An oral reprimand;
(b) A written reprimand presented only to the student;
(c) An assignment to repeat the work, to be graded on its merits;
(d) A lower or failing grade on the particular assignment or test;
(e) A lower grade in the course;
(f) A failing grade in the course;
(g) Removal of the student from the course in progress;
(h) A written reprimand to be included in the student's disciplinary file;
(i) Disciplinary probation; or
(j) Suspension or expulsion from the university.

**(2)** One or more of the disciplinary sanctions listed in sub. (1) may be imposed for an incident of academic misconduct.

**History:** Cr. Register, February 1989, No. 398, eff., 3-1-89

**UWS 14.05 Procedures: Disciplinary Sanction Imposed at the Discretion of the Instructor.**

**(1)** Where an instructor concludes that a student enrolled in one of his or her courses has engaged in academic misconduct in the course, the instructor for that course may impose one or more of the following disciplinary sanctions, as listed under s. UWS 14.04(1)(a) through (c):

(a) An oral reprimand;
(b) A written reprimand presented only to the student; or
(c) An assignment to repeat the work, to be graded on its merits.

**(2)** No disciplinary sanction may be imposed under this section unless the instructor promptly offers to discuss the matter with the student. The purpose of this discussion is to permit the instructor to review with the student the bases for his or her belief that the student engaged in academic misconduct, and to afford the student an opportunity to respond.

**(3)** A student who receives a disciplinary sanction under this section has the right to a hearing before the academic misconduct hearing committee under s. UWS 14.08 to contest the determination that academic misconduct occurred, or the disciplinary sanction imposed, or both. If the student desires such a hearing, he or she must file a written request with the student affairs officer within 10 days of imposition of the disciplinary sanction by the instructor.

**History:** Cr. Register, February 1989, No. 398, eff. 3-1-89.

**UWS 14.06 Procedures: Disciplinary Sanction Imposed Following a Report of Academic Misconduct by the Instructor.** Where an instructor believes that a student enrolled in one of his or her courses has engaged in academic misconduct and the sanctions listed under s. UWS 14.04(1)(a) through (c) are inadequate or inappropriate, the instructor may proceed in accordance with this section to impose, subject to hearing rights in s. UWS 14.08, one or more of the disciplinary sanctions listed under s. UWS 14.04(1)(d) through (h).

**(1)** CONFERENCE WITH STUDENT. When an instructor concludes that proceedings under this section are warranted, the instructor shall promptly offer to discuss the matter with the student. The purpose of this discussion is to permit the instructor to review with the student the bases for his or her belief that the student engaged in academic misconduct, and to afford the student an opportunity to respond.

**(2)** DETERMINATION BY THE INSTRUCTOR THAT NO ACADEMIC MISCONDUCT OCCURRED. If, as a result of a discussion under sub. (1), the instructor determines that academic misconduct did not in fact occur or that no disciplinary sanction is warranted under the circumstances, the matter will be considered resolved without the necessity for further action or a written report.

**(3)** PROCESS FOLLOWING DETERMINATION BY THE INSTRUCTOR THAT ACADEMIC MISCONDUCT OCCURRED. (a) If, as a result of a discussion under sub. (1), the instructor determines that academic misconduct did occur and that one or more of the disciplinary sanctions listed under s. UWS 14.04(1)(d) through (h) should be recommended, the instructor shall prepare a written report so informing the student, which shall contain the following:

1. A description of the misconduct;
2. Specification of the sanction recommended;
3. Notice of the student's right to request a hearing before the academic misconduct hearing committee; and
4. A copy of the institutional procedures adopted to implement this section.

(b) The written report shall be delivered personally to the student or be mailed to the student by regular first class United States mail at his or her current address, as maintained at the institution. In addition, copies of the report shall be provided to the institution's student affairs officer and to others authorized by institutional procedures.

(c) A student who receives a written report under this section has the right to a hearing before the academic misconduct hearing committee under s. UWS 14.08 to contest the determination that academic misconduct occurred, or the choice of disciplinary sanction, or both. If the student desires the hearing before the academic misconduct hearing committee, the student must file a written request with the student affairs officer within 10 days of personal delivery or mailing of the written report. If the student does not request a hearing within this period, the determination of academic misconduct shall be regarded as final, and the disciplinary sanction recommended shall be imposed.

**(4)** PROCESS FOLLOWING DETERMINATION BY THE INSTRUCTOR THAT DISCIPLINARY PROBATION, SUSPENSION OR EXPULSION MAY BE WARRANTED. (a) If, as a result of a discussion under sub. (1), the instructor determines that academic misconduct did occur and that disciplinary probation, suspension or expulsion under s. UWS 14.04(1)(i) or (j) should be recommended, the instructor shall provide a written report to the investigating officer, which shall contain the following:

1. A description of the misconduct; and
2. Specification of the sanction recommended.

(b) Upon receipt of a report under this subsection, the investigating officer may proceed, in accordance with s. UWS 14.07, to impose a disciplinary sanction.

**History:** Cr. Register, February 1989, No. 398, eff., 3-1-89

**UWS 14.07 Procedures: Disciplinary Sanction Imposed Following a Report of Academic Misconduct by the Investigating Officer**. The investigating officer may proceed in accordance with this section to impose, subject to hearing and appeal rights, one or more of the disciplinary sanctions listed in s. UWS 14.04(1)(g) through (j).

**(1)** AUTHORITY OF INVESTIGATING OFFICER. The investigating officer may proceed in accordance with this section when he or she receives information that a student at the institution has engaged in alleged academic misconduct and:

(a) Some or all of the alleged academic misconduct occurred outside the scope of any course for which the involved student is currently registered;

(b) The involved student has previously engaged in academic misconduct subject to the disciplinary sanctions listed in s. UWS 14.04(1)(d) through (j);

(c) The alleged misconduct would, if proved to have occurred, warrant a sanction of disciplinary probation, suspension or expulsion; or

(d) The instructor in the course is unable to proceed.

**(2)** CONFERENCE WITH STUDENT. When the investigating officer concludes that proceedings under this section are warranted, he or she shall promptly offer to discuss the matter with the student. The purpose of this discussion is to permit the investigating officer to review with the student the bases for his or her belief that the student engaged in academic misconduct, and to afford the student an opportunity to respond.

**(3)** CONFERENCE WITH INSTRUCTOR. An investigating officer proceeding under this section shall discuss the matter with an involved instructor. This discussion may occur either before or after the conference with the student. It may include consultation with the instructor on the facts underlying the alleged academic misconduct and on the propriety of the recommended sanction.

**(4)** DETERMINATION BY THE INVESTIGATING OFFICER THAT NO ACADEMIC MISCONDUCT OCCURRED. If, as a result of discussions under subs. (2) and (3), the investigating officer determines that academic misconduct did not in fact occur or that no disciplinary sanction is warranted under the circumstances, the matter will be considered resolved without the necessity for further action or a written report.

**(5)** PROCESS FOLLOWING DETERMINATION BY THE INVESTIGATING OFFICER THAT ACADEMIC MISCONDUCT OCCURRED. (a) If, as a result of discussions under subs. (2) and (3), the investigating officer determines that academic misconduct did occur and that one or more of the disciplinary sanctions listed under s. UWS 14.04(1)(g) through (j) should be recommended, the investigating officer shall prepare a written report so informing the student, which shall contain the following:

1. A description of the misconduct;
2. Specification of the sanction recommended;
3. Notice of the student's right to a hearing before the academic misconduct hearing committee; and
4. A copy of the institutional procedures adopted to implement this section.

(b) The written report shall be delivered personally to the student or mailed to the student by regular first class United States mail at his or her current address, as maintained at the institution. In addition, a copy of the report shall be provided to the instructor and to the institution's student affairs officer.

(c) A student who receives a written report under this section has the right to a hearing before the academic misconduct hearing committee under s. UWS 14.08 to contest the determination that academic misconduct occurred, or the choice of disciplinary sanction, or both.

1. Except in cases where the disciplinary sanction recommended is disciplinary probation, suspension or expulsion, if the student desires the hearing before the academic misconduct hearing committee, the student must file a written request with the student affairs officer within 10 days of personal delivery or mailing of the written report. If the student does not request a hearing within this period, the determination of academic misconduct shall be regarded as final, and the disciplinary sanction recommended shall be imposed.

2. In cases where the disciplinary sanction recommended is disciplinary probation, suspension or expulsion, the student affairs officer shall, upon receipt of the written report under par. (b), proceed under s. UWS 14.08 to schedule a hearing on the matter. The purpose of the hearing shall be to review the determination that academic misconduct occurred and the disciplinary sanction recommended. A hearing will be conducted unless the student waives, in writing, the right to such a hearing.

**History:** Cr. Register, February 1989, No. 398, eff., 3-1-89

**UWS 14.08 Procedures: Hearing. (1)** If a student requests a hearing, or a hearing is required to be scheduled under s. UWS 14.07(5)(c)2, the student affairs officer shall take the necessary steps to convene the academic misconduct hearing committee and shall schedule the hearing within 10 days of receipt of the request or written report, unless a different time period is mutually agreed upon by the student, instructor or investigating officer, and the members of the hearing committee.

**(2)** Reasonably in advance of the hearing, the committee shall obtain from the instructor or investigating officer, in writing, a full explanation of the facts upon which the determination of misconduct was based, and shall provide a copy of Chapter UWS 14 to the student.

**(3)** The hearing before the academic misconduct hearing committee shall be conducted in accordance with the following requirements:

(a) The student shall have the right to question adverse witnesses, the right to present evidence and witnesses, and to be heard in his or her own behalf, and the right to be accompanied by a representative of his or her choice.

(b) The hearing committee shall not be bound by common law or statutory rules of evidence and may admit evidence having reasonable probative value, but shall exclude immaterial, irrelevant, or unduly repetitious testimony, and shall give effect to recognized legal privileges.

(c) The hearing committee shall make a record of the hearing. The record shall include a verbatim record of the testimony, which may be a sound recording, and a file of the exhibits offered at the hearing. Any party to the hearing may obtain copies of the record at his or her own expense. Upon a showing of indigency and legal need, a party may be provided a copy of the verbatim record of the testimony without charge.

(d) The hearing committee shall prepare written findings of fact and a written statement of its decision based upon the record of the hearing.

(e) The hearing committee may find academic misconduct and impose a sanction of suspension or expulsion only if the proof of such misconduct is clear and convincing. In other cases, a finding of misconduct must be based on a preponderance of the credible evidence.

(f) The committee may impose a disciplinary sanction that differs from the recommendation of the instructor or investigating officer.

(g) The instructor or the investigating officer or both may be witnesses at the hearing conducted by the committee, but do not have responsibility for conducting the hearing.

(h) The decision of the hearing committee shall be served upon the student either by personal delivery or by first class United States mail and shall become final within 10 days of service, unless an appeal is taken under s. UWS 14.09.

**History:** Cr. Register, February 1989, No. 398, eff., 3-1-89

**UWS 14.09 Appeal to the Chancellor. (1)** Where the sanction prescribed by the hearing committee is suspension or expulsion, the student may appeal to the chancellor to review the decision of the hearing committee on the record. In such a case, the chancellor shall sustain the decision of the academic misconduct hearing committee unless the chancellor finds:

(a) The evidence of record does not support the findings and recommendations of the hearing committee;

(b) Established procedures were not followed by the academic misconduct hearing committee and material prejudice to the student resulted; or

(c) The decision was based on factors proscribed by state or federal law regarding equal educational opportunities.

**(2)** If the chancellor makes a finding under sub. (1), the chancellor may remand the matter for consideration by a different hearing committee, or, in the alternative, may invoke an appropriate remedy of his or her own.

**History:** Cr. Register, February 1989., No. 398, eff., 3-1-89

**UWS 14.10 Discretionary Appeal to the Board of Regents.** Institutional decisions under ss. UWS 14.05 through 14.09 shall be final, except that the board of regents may, at its discretion, grant a review upon the record.

**History:** Cr. Register, February 1989., No. 398, eff., 3-1-89

**UWS 14.11. Settlement.** The procedures set forth in this chapter do not preclude a student from agreeing that academic misconduct occurred and to the imposition of a sanction, after proper notice has been given. Required written reports, however, may not be waived.

**History:** Cr. Register, February 1989., No. 398, eff., 3-1-89

**UWS 14.12 Effect of Discipline within the University System.** Suspension or expulsion shall be system wide in effect.

**(1)** A student who is suspended or expelled from one institution in the university of Wisconsin system may not enroll in another institution in the system unless the suspension has expired by its own terms or one year has elapsed after the student has been suspended or expelled.

**(2)** Upon completion of a suspension period, a student may re-enroll in the institution which suspended him or her as if no suspension had been imposed.

**History:** Cr. Register, February 1989., No. 398, eff., 3-1-89

**UWS 14.13 Right to Petition for Readmission.** A student who has been expelled may petition for readmission, and a student who has been suspended may petition for readmission prior to the expiration of the suspension period. The petition for readmission must be in writing and directed to the chancellor of the institution from which the student was suspended or expelled. The petition may not be filed before the expiration of one year from the date of the final determination in expulsion cases; or before the expiration of one-half of the suspension period in suspension cases. The chancellor shall, after consultation with elected representatives of the faculty, academic staff, and students, adopt procedures for determining whether such petitions will be granted or denied.

**History:** Cr. Register, February 1989., No. 398, eff., 3-1-89

**UWS 14.14 Investigating Officer.** The chancellor of each institution, in consultation with faculty, academic staff, and student representatives, shall designate an investigating officer or officers for student academic misconduct. The investigating officer shall have responsibility for investigating student academic misconduct and initiating procedures for academic misconduct under s. UWS 14.07. An investigating officer may also serve on the academic misconduct hearing committee for a case, if he or she has not otherwise been involved in the matter.

**History:** Cr. Register, February 1989., No. 398, eff., 3-1-89

**UWS 14.15 Academic Misconduct Hearing Committee: Institutional Option.** The chancellor of each institution, in consultation with faculty, academic staff, and student representatives, shall adopt policies providing for the establishment of a student academic misconduct hearing committee or designation of a hearing examiner to fulfill the responsibilities of the academic misconduct hearing committee in this chapter.

**(1)** A student academic misconduct hearing committee shall consist of at least three persons, including a student or students, and the presiding officer shall be appointed by the chancellor. The presiding officer and at least one other member shall constitute a quorum at any hearing held pursuant to due notice.

**(2)** A hearing examiner shall be selected by the chancellor from the faculty and staff of the institution.

**History:** Cr. Register, February 1989., No. 398, eff., 3-1-89

**UWS 14.16 Notice to Students.** Each institution shall publish and make freely available to students copies of Chapter UWS 14 and any institutional policies implementing Chapter UWS 14.

**History:** Cr. Register, February 1989., No. 398, eff., 3-1-89

**UWS 14.17 Notice to Instructors.** Each institution shall adopt procedures to ensure that instructors are familiar with these policies. Each institution shall provide instructors with copies of Chapter UWS 14 and any institutional policies implementing Chapter UWS 14 upon employment with the university, and each department chair shall be provided such copies upon assuming the duties of the chair.

**History:** Cr. Register, February 1989., No. 398, eff., 3-1-89

**UWS 14.18 Consistent Institutional Policies.** Each institution is authorized to adopt policies consistent with this chapter. A copy of such policies shall be filed with the board of regents and the university of Wisconsin system office of academic affairs.

**History:** Cr. Register, February 1989., No. 398, eff., 3-1-89

# Colgate University

## Academic Dishonesty

- ❑ Policy on Academic Dishonesty
- ❑ Writing Research Papers
- ❑ Writing the College Research Paper With Hints on Avoiding the "Plagiarism Question."

### *Policy on Academic Dishonesty*

Academic dishonesty is a serious offense at the University because it undermines the bonds of trust and honesty among members of the community and defrauds others who will eventually rely upon their knowledge and integrity. Because of the variations in definitions of academic dishonesty which students bring with them from their secondary preparation, the University established a clear policy (approved by the University Council on March 3, 1976) by which all members of the Colgate community can be guided. This policy is defined in detail on the following pages, and it is strongly recommended that all students read these pages carefully, as well as the two helpful articles on writing research papers which are reprinted at the end of this chapter.

Briefly stated, academic dishonesty shall consist of *any attempt to misrepresent one's performance on any exercise submitted for evaluation.* Departments, at their option, may further clarify this general definition in writing (and distribute this clarification in courses in that department) and a violation of the Department's statement shall be considered a violation of the academic dishonesty policy of the University as a whole. In any situation where a student questions the appropriateness of representing a work as his or her own, it will be the *student's responsibility* to raise the question with the instructor.

**Disciplinary Procedures** An instructor who suspects that a student has committed an act of academic dishonesty should inform the Disciplinary Officer (see following chapter, "University Student Disciplinary System"). An instructor who is uncertain about whether the exercise in question involves academic dishonesty or simple negligence is encouraged to discuss the subject with the Disciplinary Officer. Further, while no formal time limitations exist in matters of academic dishonesty, professors should bring their complaints or suspicions to the Disciplinary Officer's attention as soon as possible.

The Disciplinary Officer prepares and refers cases of suspected academic dishonesty to the Disciplinary Board, which is composed of faculty members, staff and students. The instructor and student will be asked to appear before the Board. If the Disciplinary Board finds the student in violation, it will assess appropriate sanctions. If the Board finds the student not in violation, whatever negligence the student's work represents may be reflected in the instructor's evaluation of the assignment.

*A special note about the use of computers and word processing equipment:* The majority of Colgate students use electronic word processing equipment (the Colgate mainframe computer, personal computers, memory typewriters, etc.) in researching and preparing papers, take-home examinations and other written assignments, and in recent years, many academic dishonesty cases have had a "computer" aspect that a Disciplinary Board panel was asked to consider as evidence. Electronic work processing equipment makes it relatively easy to manipulate notes or a manuscript, and students suspected of academic dishonesty have occasionally sought to "blame" the computer for acts of dishonesty. *Students are reminded that a concern about academic dishonesty will be based on what the student* *submits for evaluation and not how the assignment was prepared.* Claims that: "The computer printed out my notes and not my final paper" (or) "I wrote my notes into the memory of the computer and forgot to record footnotes as I went along" (or) "A friend printed out my paper and submitted it for me, but he got the wrong paper off my disk" or similar explanations will not excuse acts of academic dishonesty. Word processing computers are wonderful aids to writing academic assignments, but one must be especially careful in using them to adhere strictly to Colgate's standards of academic integrity.

*Ignorance of University policy concerning academic dishonesty shall not be a defense in any Disciplinary Board proceeding.*

**Forms of Academic Dishonesty:**

Academic dishonesty is defined by the Section 8.a. of the Code of Student Rights and Responsibilities and includes but is not limited to the following examples:

**Cheating** Cheating shall be defined as attempting to use prohibited materials, information, or study aids in any academic exercise. To prevent possible claims of cheating, there should be strict adherence to the following guidelines:

1. Faculty members should state in advance their policies and procedures concerning examinations and other academic exercises. Student should request such information if a faculty member neglects to offer it.
2. It is especially important that clear guidelines be established and followed concerning the use of "take home" examinations.
3. Students completing an "in class" or "take home" examination should assume that any external assistance (e.g., books, notes, calculators, conversations with others) is prohibited unless specifically authorized by the instructor.
4. Substantial portions of the same academic work may not be submitted for credit or honors more than once without the permission of the current instructor.
5. Students must not allow others to conduct research or prepare any work for them without advance authorization from the instructor. This comment includes, but is not restricted to, commercial term paper companies and files of past papers.

**Fabrication** Fabrication shall be defined as the attempt to falsify or invent without authorization any information or citation in an academic exercise. To prevent possible claims of fabrication, there should be strict adherence to the following guidelines:

1. "Invented" information may not be used in any laboratory experiment or other academic exercise without notice to and authorization from the instructor. It would be improper, for example, to analyze one sample in an experiment and covertly "invent" data based on that single experiment for several more required analyses.
2. A student should acknowledge the actual source from which he or she obtains cited information. For example, a writer should not reproduce a quotation found in a book review and indicate that the quotation was obtained from the book itself.

**Facilitating Academic Dishonesty** Facilitating academic dishonesty shall be defined as attempting to help another to commit an act of academic dishonesty. For example, if a student gives another student a specific answer to a homework assignment and knows that such assistance was either prohibited or would not be acknowledged, he or she is facilitating academic dishonesty.

**Plagiarism** Plagiarism shall be defined as the attempt to represent "the words or ideas of another person as one's own." The quotation is from an outstanding discussion of "avoiding plagiarism" by James D. Lester, *Writing Research Papers*, 2nd ed. (1976), p. 48, which is reprinted below in its entirety.*

### Writing Research Papers

by James D. Lester

> Fundamentally, plagiarism is the offering of the words or ideas of another person as one's own. While the most blatant violation is the use of another student's work, the most common is the intentional misuse of your reference sources. Since you will be working with the writings of others, it is important that you learn and adhere to certain ethical rules as to the use of reference material. One of the chief reasons for following these rules is that you want to avoid being falsely accused of plagiarism when your only error was unintentionally failing to acknowledge a source.
>
> An obvious form of plagiarism is copying any direct quotation from your source. A more subtle form, but equally improper, is the paraphrasing of material or use of an original idea if that paraphrase or borrowed idea is not properly introduced and documented. Remember that another author's ideas, interpretations, and words are his or her property; they are protected by law and must be acknowledged whenever you borrow them. Consequently, your use of source materials requires that you conform to a few rules of conduct:
>
> 1. Acknowledge borrowed material within the text by introducing the quotation or paraphrase with the name of the authority from whom it was taken.
> 2. Enclose within quotation marks all quoted materials.
> 3. Make certain that paraphrased material is written in your own style and language. The simple rearrangement of sentence patterns is unacceptable.
> 4. Provide a footnote for each borrowed item.
> 5. Provide a bibliography entry for every book or magazine that appears in the footnotes. (NOTE: Some, in fact most, papers in college are too short to merit a bibliography, which is technically a complete listing of all books relevant to the subject. It is usually better to list your sources at the end of the paper and name the list according to what it is: "List of Works Cited," or List of Works Consulted.")
>
> The examples provided below should reveal the difference between genuine research writing and plagiarism. First, here is the original reference material; it is followed by three student versions, only one of which would not be called plagiarism:

**Original Material**

I don't think that black women can afford to be competitive with their men — especially now. Competing with them for jobs would just add to the problem that already exists. Black women have been able to find work when their husbands couldn't and have often been the head of the family not because they wanted to be but out of economic necessity. Some of those women's lib girls are asking for jobs that black men haven't been able to get.[1]

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*Reprinted by permission from WRITING RESEARCH PAPERS by James D. Lester. Copyright 1971 by Scott Foresman and Company.

[1] Marjorie Barnes as quoted by Renee Ferguson, *Washington Post*, 3 Oct. 1970, rpt. in *Black Women in White America*, ed. Gerda Lerner (New York: Pantheon, 1972), p. 589.

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**Student Version A (Unacceptable)**

> Black women have usually been less discriminated against than their male counterparts. For example, black women have been able to find work when their husbands couldn't and have often been the head of the family not because they wanted to be but out of economic necessity.

This piece of writing is plagiarism in a most deplorable form. The student has simply borrowed abundantly from the original source, even to the point of retaining the essential wording, and has provided no documentation whatever, which implies to the reader that these sentences are entirely his or her original creation.

**Student Version B (Unacceptable)**

> Black women have usually been less discriminated against than their male counterparts. For example, most black women have usually been able to find jobs when their husbands couldn't. And they have sometimes been head of the household out of economic necessity, not because they wanted to be.[7]
>
> [7] Marjorie Barnes as quoted by Renee Ferguson, *Washington Post*, 3 Oct. 1970; rpt. in *Black Women in White America*, ed. Gerda Lerner (New York: Pantheon, 1972), p. 589.

This student's version is also plagiarism, even though the citation is carefully documented. He or she has obviously copied almost directly from the source, changing only a few words and phrases. The student also failed to introduce the borrowed materials; thus, the reader is uncertain about the footnote. Does it refer to the entire paragraph or only the final sentence or two? As a research writer, you may avoid these errors by introducing the material as direct quotation or, if you prefer, as a scholarly paraphrase that might include direct quotation of a few significant or well-worded phrases.

**Student Version C (Acceptable)**

> Black women have usually been less discriminated against than their male counterparts. For example, Marjorie Barnes points out that black women often find employment while their husbands cannot. She adds that "economic necessity" has forced some of these women to be heads of households even though they did not seek the role.[7]
>
> [7] Marjorie Barnes as quoted by Renee Ferguson, *Washington Post*, 3 Oct. 1970; rpt. in *Black Women in White America*, ed. Gerda Lerner (New York: Pantheon, 1972), p. 589.

This version represents a satisfactory handling of the source material. (For an example of usage that employs more direct quotation, see the sample research paper, p. 81 [in Lester, *Writing Research Papers*].) The authority is acknowledged at the outset, and the substance of the commentary is well expressed in the student's own language with one phrase

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directly quoted, so as to give full credit where the credit is due. The student has been wholly honest to the source material while effectively using that source for a particular purpose.

A further helpful discussion of avoiding plagiarism by Margaret Maurer, a member of the Colgate University faculty, is reprinted below:

### Writing the College Research Paper With Hints on Avoiding the "Plagiarism Question"

by Margaret Maurer

©Margaret Maurer 1976

This essay is designed for the college student who has "never written a paper at the college level." Its purpose is to discuss what college professors expect of you when they assign term papers. It will not give you footnote models or hints about how to use the library because its purpose is really more fundamental than that. Many students come to college without ever having written a paper and have no idea of what the process involves. Worse yet, many students come from high school with a set of bad habits about writing papers that often gets them into trouble, plagiarism-trouble, when they attempt their first college-level papers.

Sheridan Baker, in a chapter on "The Research Paper" in *The Practical Stylist* puts the problem very well:

> The research paper is very likely not what you think it is. *Re-search* is searching again. You are looking, usually, where others have looked before; but you hope to see something they have not. Re-search is not combining a paragraph from the *Encyclopedia Britannica* and a paragraph from *The Book of Knowledge* with a slick pinch from *Life*. That's robbery. Nor is it research if you carefully change each phrase and acknowledge the sources. That's drudgery, a kind of scavenging, what you have done in school as a "report" — sanctioned plagiarism to teach something about ants or Ankara, a tedious compiling of what is already known. That such material is new to you is not the issue; it is already in the public stock. What, then, can you do with things so well stocked?[1]

This essay will tell you what to do about that problem.

The most important single concept about writing a paper is really a very simple one but it is what students are usually most nervous about: you must have an idea. It need not be a great idea and certainly, in a research paper, it will not be entirely original; but it must by *yours* and it must be distinct enough and good enough to put what others have said on the subject in perspective. Sheridan Baker calls this idea your *thesis*. His book *The Practical Stylist* and another very good book by James Lester, *Writing Research Papers*, stress the importance of *thesis*.[2] Your thesis is your theory or opinion about a topic, and in a research paper, that theory involves your judgement about what others have said on your subject. Once you know what you want to say about a subject, you will realize that your problem in writing a research paper is to explain how the ideas of others led to or relate to your idea. Your thesis may be no more original than something list this: "The specialists who have written about this problem propose one of three solutions, but no one has a complete answer." Yet such a thesis reveals that you have made a

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[1] Sheridan Baker, *The Practical Stylist*, 3rd ed. (New York: Thomas Y. Crowell, Inc., 1973), p. 93.

[2] James D. Lester, *Writing Research Papers: A Complete Guide*, 2nd ed. (Glenview, Ill.: Scott, Foresman and Co., 1976), pp. 9-10. See Baker, pp. 93-94.

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judgement based on what you've read, and that's what the college research paper does. In the paper, you must find the clearest way to show how what is already in print relates to what you want to say.

Most problems about writing a paper (and most of the difficulties about what constitutes plagiarism) come up because you are not serious about what you want to say. Your own ideas are not all that clear, you don't know enough about a topic to know if your references are correct or limited, you can't evaluate what you have read by other writers. So what do you do? You may ramble; you may fear "too many quotes" so you change the tense of the verb and call it a paraphrase. You are really just playing hide-and-seek.

Writing a college paper means that you stop doing that. You take your work more seriously. You do the most thorough research you can. You make a judgement about what you have read by others. You derive a thesis that is your own, even if it is *based* entirely on opinions and facts assembled by others. Then you write a paper to explain your judgement. If you are confident of the worth of your thesis, you will want to be as clear as you can about how you were led to that idea. You will have a big stake in documenting your paper as fully as you can because you will want to show you are right. You will assume that people will check your references, not to see if you are honest about your obligations (although your instructor may do that) but to judge the worth of your idea. When you are confident about what you want to say, there is no point in hiding where it came from.

If you don't have an idea and try to write as if you did, you may get into trouble for misrepresenting someone else's work as yours (plagiarism). At the very least, you will write a careless or inadequate paper, and in college that is usually not sufficient, even if you are earnest and "spend a lot of time on it." So keep in mind that it is what you say, how you evaluate what you have read, that matters. And remember the following things about the process of writing a paper.

**I. Choosing a topic**

Narrow it. A paper on "Mayor Daley of Chicago" is almost inevitably a boring compilation of secondary sources. The writer has to copy out so much general material, it is no wonder he usually succumbs to sticking too closely to the wording of *Who's Who*. A paper on "Mayor Daley and His Critics in the Eastern Press" is free of such dilemmas almost from the start. The very topic requires the writer to make judgements.

**II. Gathering material**

A. Read widely in the field. Know what the main references are and how they differ from one another. Ask yourself what each reference's thesis is and determine how what he says relates to the thesis (main idea) of his book or article. Attach names to opinions. Just because an idea is in print, it is not necessarily the right way or the only way to look at something.
NOTE: Looking for the thesis in others' work is good practice for deriving your own. It also makes you a better reader. It is an indispensable study habit. It helps you organize what you've read.

B. Learn how to find and use reviews of the main references so you can check your evaluations against those of the experts who have reviewed the work you're using. But *don't use a review in place of the main reference.* See for yourself.
NOTE: If you are working with limited library facilities, you may honestly be unable to find a reference. In that case, you will want to tell your reader what you did and why. Sometimes this will mean a footnote like "I was unable to located Professor Smith's major article on this question, so I had to depend on the summary in ________." See below under Section V.A.

C. Remember, the more confident you are of the thoroughness of your research, the less likely you are to cling to the ideas of others.

## III. Taking notes

A. Use 3 x 5 or 4 x 6 cards, not sheets of paper. This will discourage you from copying out huge segments instead of looking for thesis sentences and summarizing. Photocopies are useful but they are no substitute for the process of taking notes. Don't make photocopies of books or articles and underline them instead of taking notes; worse yet, don't deface the books or articles themselves in place of note-taking. Small cards make you summarize, put ideas into your own words, as you read. You look for thesis sentences and key ideas in your references.

B. Be scrupulous about putting all directly quoted material, even if only a key word or phrase, in quotation marks. If someone else "said it so well," then acknowledge that aptness by quotation marks. If your point *depends* on the words and ideas of others, as the thesis of a research paper usually does, and if it is not simply a re-write of someone else's argument, as any good paper is not, you enhance your paper by indicating the precise extent of your obligations.

C. Never paraphrase just because you have "too many quotes." That will almost always be an inadequate paraphrase. Unless you have a good reason to paraphrase (for instance, to make an argument shorter or clearer or to make its style conform to the style of your paper), quote directly.

D. Be scrupulous about page numbers, for indirect as well as direct quotations. The paper you write is your own. You assume responsibility for your conclusions; and if someone reads your paper and wants to verify your argument, he needs to know on what pages of *American Civilization* Professor Jones describes Puritan morality. Even if you do not quote directly from the book, you need to be precise about where in the book (a range of pages or a chapter) you found the information you are summarizing.

## IV. Writing the paper

A. Develop a thesis that puts what you will say in relation to what others have said on the subject. Consider this thesis sentence: "*The Scarlet letter*, though generally talked about as a great moral novel, is historically untrue." The opinion that *The Scarlet Letter* is a great moral novel represents the writer's understanding of the focus of much criticism about the book. It is not the writer's opinion. The book's historical inaccuracy may likewise be argued in her secondary sources and so may not be the writer's opinion or discovery either. But the decision to stress the "historically inaccurate" over the "great moral novel" judgement is the writer's own, based on what she's read in the novel and its critics.
NOTE: Lester, pp. 9-10 is especially good on the development of the thesis for a term paper. The example in Section IV.A. is adapted from the thesis in the model term paper in *The Practical Stylist*.

B. When you introduce the ideas of another into your paper, *whether in a direct quotation or in an indirect quotation*, when you use another's data or charts, every time you allude to a reference, *mention the author by name in the text of your paper*. If you are using an anonymous periodical, mention the name and date of the periodical. If this seems awkward at first, practice will make you graceful. The habit does three things:

   1. It alerts your reader to what references you are using and how they relate to one another: "Smith says . . . Chandler agrees . . . Gennet argues, however . . . "
   2. It alerts *you* to how you are using your references. A string of "Paulson says . . . Paulson continues . . . Paulson concludes . . . " means that this part of your paper is Paulson's not yours. That may be what you need to do, but you and your reader should be clear that that's what's going on.
   3. It is a clear way of indicating where your debt to a reference begins. The author's name at the beginning of a reference and a footnote number at the end makes the

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precise extent of your obligation clear.

NOTE: This technique of introducing references, if done awkwardly, may seem ponderous or ridiculous. But it is usually better to do it all the time, especially in the first draft. In subsequent drafts of your paper, you may reach the point of handling the material confidently enough to smooth out some of this.

### V. Footnoting

A. Use footnotes to make the extent of your obligations clear. Assume that your reader will want to check you, not necessarily to see if you are honest, but to see if he agrees with the conclusions you draw from your references. Tell the reader everything he needs to know to see what you saw. Consider a footnote that explains: "I base my conclusion on the accounts of the trial in *Time* (3 January 1956), p. 27, *Newsweek* (6 January 1956), p. 11, and *The New Republic* (27 January 1956), pp. 20-23." Or "This idea was suggested to me in conversation with Professor Able, whose book on agricultural economics [give reference] first called attention to the problem."

B. Get at the root of things you're not sure about.

1. Many students wonder what to do about ideas they "got from class." The answer is obvious: ask the instructor if that idea is in print (if so, go read about it and footnote it) and if it needs a footnote. If so, your instructor can advise you how to do it.
2. Sometimes you "know you read it somewhere" but you can't be sure where. That kind of sloppiness is, of course, one of the things that distinguishes bad papers from good ones. Good students take good notes. So don't try to ignore the problem. Go back to your references and find out where it was. Often your instructor can help you, or annotated bibliographies in textbooks can suggest where you are most likely to find it.
3. What about the "commonly accepted" ideas about a subject that are repeated in all your references? You've done the research, and if that research has been thorough you should be in a position to say if an idea is in the "public domain" and doesn't need a footnote. But if you have any doubts, then consider a footnote like "This reading is Professor Paul's and it has been accepted by all critics of the play."
4. What about your really "original idea" that you suddenly found somewhere else? Again, don't hide. A footnote like this will do: "I note that Professor Green also makes this point. [Give reference.]" Of course, if *all* your ideas have already been said, you need a new thesis, perhaps a new topic.

   NOTE: All these suggestions presume that you are familiar with what has been written about your topic. That is, of course, part of the business of writing the kind of paper this essay is talking about. The more thorough you are, the better off you are in dealing with these problems.

C. Adopt the footnote style that your instructor recommends. There are two common ones: Kate L. Turabian, *A Manual for Writers of Term Papers, Theses, and Dissertations*, 4th ed. (Chicago: Univ. of Chicago Press, 1973), commonly used in the social sciences; and the *MLA Style Sheet*, 2nd ed. (New York: Modern Language Association, 1970), used in the humanities.

Finally the best discussion of plagiarism is that by James D. Lester in *Writing Research Papers*. His remarks on "avoiding plagiarism" are [reproduced above this essay] . . . Colgate highly recommends Lester's book because it emphasizes the importance of learning, in his words, to "shape the material derived from research" (p.2) into something *you* have done. This is the college research paper.

STATE OF FLORIDA
DEPARTMENT OF EDUCATION
DIVISION OF UNIVERSITIES
THE FLORIDA STATE UNIVERSITY

**RULE NO:** 6C2-3.004
**RULE TITLE:** Student Conduct Code

**(Substantial rewording of Rule 6C2-3.004. See F.A.C. for present text)**

(1) **Introduction.** The Student Conduct Code applies the principles found in the "Statement on Values at Florida State University" by promoting responsible freedom for all students. Responsible freedom is exercised when actions are directed by ethical standards. This Code seeks to apply the principle of responsible freedom as it guides the conduct of Florida State University students. Moreover, the Code operates as a vehicle for informing students about their rights and responsibilities while reinforcing the development of ethical standards that make responsible freedom possible. The "Statement on Values at Florida State University" is found in the *1996/97 FSU student Handbook*, which is incorporated herein by reference.

(2) **Scope.** Florida State University jurisdiction regarding discipline is generally limited to conduct of any student or registered student organization that occurs on Florida State University premises. However, the University reserves the right to impose discipline based on any student conduct, regardless of location, that may adversely affect the University community.

The right of all students to seek knowledge, debate ideas, form opinions, and freely express their ideas is fully recognized by Florida State University. This Student Conduct Code applies to student conduct and will not be used to discipline the lawful expression of ideas. Specific restrictions on time and place of meetings and assemblies are found in Oglesby Union and other University policies.

The processes for adjudicating violations of state and federal law and violations of the Student Conduct Code are separate and may be pursued independently of one another.

**(3) Authority.**

**(a)** Authority for student discipline ultimately rests with the University President. The President delegates this authority to the Vice President for Student Affairs, and the Vice President delegates this authority to the Dean of Students and to the Director of University Housing. Under the direction of the Dean of Students and the Director of University Housing, the Associate Dean of Students, the Assistant Dean of Students, Director of Student Rights and Responsibilities, and appropriate University Housing staff are responsible for implementing the student disciplinary system. Either the President, the Vice President, or the Dean of Students may take direct jurisdiction of any case due to the inability of the appointed hearing officer to serve, or when it is determined by the immediate circumstances that taking direct jurisdiction is the best way to resolution.

**(b)** The Vice President (or designee) also has the authority to notify the person listed as the student's emergency contact (or other appropriate person) in case of an emergency involving that student.

**(c)** All hearing bodies have the authority to consult with other appropriate University officials in order to effectively resolve a Student Conduct Code case.

**(d)** Decisions of the Lower Student Court, Interfraternity Council, National Pan-Hellenic Council Judicial Board, and Panhellenic Judicial Boards are considered recommendations to the Director of Student Rights and Responsibilities.

**(e)** Decisions of administrative hearing panels are considered recommendations to the Associate Dean of Students.

**(f)** Decisions of the Housing Judicial Board(s) are considered recommendations to the Assistant Director of Housing.

**(g)** All recommended disciplinary decisions must be approved in writing by the appropriate administrator or designee. (See "c" - "f"above.) The appropriate administrator may adopt or amend the recommended decision, or order a new hearing. Upon approval, the recommended decision becomes a first-level disciplinary action.

**(h)** Decisions of all other hearing bodies constitute firstlevel disciplinary actions.

**(i)** If a first-level disciplinary action is not appealed, that decision becomes final agency action.

**(j)** Appellate bodies are listed in Section 10, Appeals. Appellate decisions are considered recommendations to the Vice President for Student Affairs and become final agency action upon approval by the Vice President or designee.

**(4) Definitions.**

**(a)** University. The term "University" means Florida State University, including all of its branch campuses. The Student Conduct Code applies to all branch campuses of the University; however, non-substantive procedural modifications to reflect the particular circumstances of each regional campus are permitted.

**(b)** Student. The term "student" means any person who is admitted to and enrolled in any credit-bearing course or program in any school or division of Florida State University, any person who is admitted to the University and is present on campus for the purpose of being enrolled in any University course or program, or any person who has been enrolled in any creditbearing course or program at the University and continues to be associated with the University because he or she has not completed the course or program in which he/she was enrolled. Students enrolled in the College of Law are subject to the Student Conduct Code within the College of Law. In cases of dual enrollment, jurisdiction over a student's conduct will be determined in consultation with appropriate officials at the student's other institution. The term "student" also means any student organization that is officially registered with the University.

**(c)** University Community. The term "university community" means any person who is a student, faculty member, University official, or any other person employed by the University.

**(d)** On-Campus. The term "on-campus" means all land, buildings, facilities, and other property in the possession of or owned, used, or controlled by the University, including adjacent streets, sidewalks, and parking lots.

**(e)** University Official. The term "university official" means any person employed by the University to perform assigned teaching, research, administrative, professional or other responsibilities.

**(f)** Charged Student. The term "charged student" means any student who has been formally charged with an alleged violation of the Student Conduct Code.

**(g)** Advisor. The term "advisor" means any person chosen by the charged student or the alleged victim to assist him/her throughout the disciplinary process. Students are required to address the hearing body in person, on their own behalf, although they may consult with their advisor during the hearing. This consultation must take place in a manner that does not disrupt the proceedings. The advisor shall not speak on behalf of the student unless expressly authorized to do so by the hearing body.

**(h)** Hearing Body. The term "hearing body" means any person or persons authorized by the Dean of Students or Director of University Housing to conduct hearings to determine whether a student has violated the Student Conduct Code and to impose sanctions.

**(i)** Preponderance of Evidence. "Preponderance of evidence" means that the evidence, as a whole, shows that the fact sought to be proved is more probable than not. This is the standard used in adjudicating all disciplinary cases within this Student Conduct Code.

**(j)** University Student Defender. The term "University Student Defender" means any person provided by the Student Government Association, either through formal appointment or informal referral, to serve as a resource and advisor to the charged student.

**(k)** Policy. The term "policy" means the written regulations of the University as found in the Student Conduct Code, the *General Bulletin, The Student Handbook,* the *Directory of Classes,* the *Guide to Residence Living* and other written regulations and rules for departments, organizations and clubs.

**(l)** Class days. The term "class days" means any day that either classes or final exams are scheduled.

**(5)** **Offenses.** The following offenses, or the aiding, abetting, or inciting of, or attempting to commit these offenses, represent violations of the Student Conduct Code.

**(a)** Sexual Misconduct.

**1.** Any sexual act that occurs without the consent of the victim, or that occurs when the victim is unable to give consent.

**2.** Obscene or indecent behavior, which includes, but is not limited to, exposure of one's sexual organs or the display of sexual behavior that would reasonably be offensive to others.

**3.** Conduct of a sexual nature that creates an intimidating, hostile, or offensive campus, educational, or working environment for another person. This includes unwanted, unwelcome, inappropriate, or irrelevant sexual or gender-based activities or comments.

**(b)** Endangerment.

**1.** Physical violence towards another person or group.

**2.** Action(s) that endanger the health, safety, or well being of another person or group.

**3.** Action(s) that serve the purpose of endangering one's own health or safety.

**4.** Interference with the freedom of another person to move about in a lawful manner.

**(c)** Harassment.

**1.** Conduct, (not of a sexual nature), that creates an intimidating, hostile, or offensive campus, educational or working environment for another person.

**2.** Action(s) or statement(s) that threaten harm or intimidate another.

**3.** Acts that invade the privacy of another person.

**4.** Stalking, defined as: to follow or otherwise contact another person repeatedly, so as to put that person in fear for their life or personal safety.

**(d)** Hazing.

Any group or individual action or activity that inflicts or intends to inflict physical or mental harm or discomfort or which may demean, disgrace, or degrade any person, regardless of location, intent, or consent of participant(s). Although hazing is related to a person's initiation or admission into, or affiliation with, any student group or organization, it is not necessary to have direct proof that a person's initiation or continued membership is contingent upon participation in the activity for a charge of hazing to be upheld. The actions of either active or associate members (pledges) of an organization may be considered hazing. Hazing includes, but is not limited to:

**1.** Interference with a student's academic performance.

**2.** Forced consumption of any food, alcohol, other drugs, or any other substance.

**3.** Forced physical activity, such as calisthenics.

**4.** Deprivation of food or sleep.

**5.** Kidnapping.

**6.** Any activity that would subject the individual to embarrassment or humiliation.

Please refer to the Florida State University Hazing Policy in the *1996/97 FSU Student Handbook*, for more details.

**(e)** Weapons.

**1.** On-campus possession or use of firearms, explosives, or other weapons or dangerous articles or substances, including nonlethal weapons such as pellet guns. Note: This rule does not apply to any student law enforcement officer or to any student ROTC member acting under the supervision of an ROTC unit in a manner proscribed by military regulations.

**2.** Off-campus, illegal possession or use of firearms, explosives, or other weapons or dangerous articles or substances.

**(f)** Fire and Safety.

**1.** Inappropriate activation of any emergency warning equipment or the false reporting of any emergency.

**2.** Removal, damage, or tampering with fire safety or other emergency warning equipment.

**3.** Failure to evacuate a University building or facility when a fire alarm is sounded.

**(g)** Illegal Drugs.

**1.** Possession or use of illegal drugs.

**2.** Distribution, delivery, or sale of illegal drugs.

**3.** Possession or use of drug paraphernalia.

**(h)** Alcohol.

**1.** Possession or consumption of alcohol when under the age permitted by the State of Florida.

**2.** Dispensing alcoholic beverages to an individual who is under the age permitted by the State of Florida.

**3.** Any other violation of the FSU Alcohol Policy. Please refer to the Florida State University Alcohol Policy in the *1996/97 FSU Student Handbook*, for more details.

**(i)** Disruption.

1. Failure to comply with a lawful order of a University official or with the lawful order of any non-University law enforcement official.

2. Knowingly provides false information to a University official, including disciplinary hearing bodies.

3, Acts that impair, interfere with, or obstruct the orderly conduct, processes, and functions of the University or the rights of other members of the University community. This includes acts that occur both inside and outside of the classroom setting.

4. Commercial solicitation on campus without prior approval from University officials.

5. Acts that disrupt the University disciplinary process, including attempting to coerce or influence a person in order to discourage their participation in any disciplinary proceeding.

(j) Identification.

1. Permits another person to use his or her FSU-related identification.

2. Inappropriate use of another person's FSU-related identification.

3. Impersonation, or misrepresenting being authorized to act on behalf of another or the University.

4. Forgery, alteration, or misuse of University documents, records, or keys.

**(k) Property.**

1. Damage or destruction of public or private property.

2. Theft -- knowingly and without authorization removes or uses the property or services of another person or of the university.

3. Possession or sale of property or services that are known to have been stolen.

**(l) Computers.**

**1.** Unauthorized access or entry into a computer, computer system, network, software, or data.

**2.** Unauthorized alteration of computer equipment, software, network, or data.

**3.** Unauthorized copying or distribution of computer software or data.

**4.** Any other act that violates Florida law or the University logon guidelines that are hereby incorporated by reference.

**(m)** Other Violations

**1.** Violation of Federal or State Law or local ordinance.

**2.** Violation of Board of Regents Rule.

**3.** Aids or abets any other violation of federal law, state law, local ordinance, or the Academic Honor System.

**4.** Violation of any other University regulation as described in the *FSU General Bulletin,* University Housing contract, The Guide to Residence Living, other University Housing publications, the *FSU Student Handbook,* the FSU Greek Constitutions, Student Activities and Organization Policies, or other official University policies directly related to departments, organizations or clubs.

**(6)** **Students' Rights.**

**(a)** Notice: Students will be given clear and complete notice of the Student Conduct Code Charge and the allegations upon which the charge is based.

**(b)** Hearing: Students will be given an opportunity to present information, including witnesses, during a fair and impartial hearing.

(A more complete description of the procedures utilized to implement these rights is found in Section 7, Procedures.)

**(7)** **Procedures.** Introduction. The Office of Student Rights and Responsibilities and University Housing are charged with implementing the Student Conduct Code in ways that are congruent with the FSU "Statement on Values" and with all appropriate laws and administrative rules. The procedures implemented by these offices will be consistent with all appropriate due process rights accorded to students in University disciplinary decisions.

**(a)** Charges -- A review for possible charges may be initiated in the following ways:

**1.** Filing a police report with the FSU Police Department or requesting that a report from another law enforcement agency be sent to the FSU Police Department.

**2.** Providing a signed statement to the Office of Student Rights and Responsibilities or University Housing.

All information will then be reviewed by an appropriate staff member in the Office of Student Rights and Responsibilities or University Housing to determine whether Student Conduct Code charges will be filed. When possible, reports should be submitted to either law enforcement or the appropriate administrator in a timely manner.

**(b)** Notice. The notice given to any charged student will include the following:

**1.** Sufficient detail to prepare a defense (including source of information, alleged offense, and specific Code charges).

**2.** An invitation to attend an information session, during which the student will view all materials related to the case, receive instruction regarding the disciplinary process and the student's rights, and confirm the forum in which the case will be heard.

**3.** Notice of a formal hearing will occur at least seven class days prior to the adjudication of the case. Informal hearings will be scheduled at the convenience of the charged student and the hearing body.

**4.** Parent(s) of any student under the age of eighteen at the time of the alleged offense may also be notified of pending charges.

**5.** The Office of Student Rights and Responsibilities or University Housing may place a judicial hold on the records and registration of any student who fails to respond to a judicial notice. Any pending judicial matters must be resolved prior to a student's graduation.

**6.** The address on file with the University Registrar's Office will be used for all disciplinary notices sent to the student.

**(c)** Hearing. Hearings will follow these guidelines:

**1.** All hearings will be fair and impartial. A student may submit a challenge to the impartiality of any member of a hearing body at least five class days prior to the hearing.

**2.** A student charged with offenses will have the opportunity to present evidence on his/her behalf, including presenting witnesses and/or signed, written statements.

**3.** Both the charged student and any witnesses may be accompanied during the hearing by an advisor of their choice. The advisor may be anyone the student chooses, including the University Student Defender. The advisor may not represent the student before the hearing body; the student must speak for himself or herself. The charged student should notify the Office of Student Rights and Responsibilities of the advisor's name at least three days in advance of the hearing.

**4.** A student may choose not to answer any and all questions posed by a hearing body. This protection from self-incrimination does not extend to student organizations.

**5.** The burden of proof at a first-level hearing always rests with the University, and the standard of proof will be the preponderance of the evidence; which means that the evidence, as a whole, shows that the fact sought to be proved is more probable than not.

**6.** All hearings will be conducted in private, unless the charged student submits a written request for a public hearing at least five class days prior to the hearing. Charges involving alleged sexual misconduct will not be heard in public without the prior written consent of the alleged victim.

**7.** All hearing decisions will be communicated in writing to the charged student and will include the findings of fact, the hearing decision, and sanctions imposed (if applicable).

**8.** Appropriate witnesses will be called by the University to all formal hearings (see "d" below for a description of formal versus informal hearings). Those witnesses who appear may be cross-examined by the charged student. If called witnesses do not appear, their written or taped statements may be considered by the hearing body. In some cases, student witnesses who fail to appear may be charged with a violation of the Student Conduct Code. Appropriate witnesses may also be called by the charged student to all formal hearings.

**9.** If the charged student fails to appear at the scheduled hearing (after proper notice), the hearing may be held in the charged student's absence.

**10.** Prior records of disciplinary action and victim impact statements are considered by the hearing body only in the sanctioning phase of deliberations.

**11.** The hearing body's determination of "responsible" or "not responsible" will be based solely on the information presented at the hearing. If additional information that affects this determination is gathered outside the informal hearing, it will be shared with the charged student.

**(d)** Types of Hearings. Two distinct types of hearings (informal and formal) are provided for by this Code. Informal hearings typically can be scheduled more quickly than formal hearings and are usually better suited to cases involving fewer questions of fact. Formal hearings may be more appropriate for cases involving more serious alleged violations of the Code.

**1.** Formal Hearings:

**a.** Require the hearing body to call appropriate witnesses to provide information in support of the charges.

**b.** Will be held no sooner than seven class days after notice is received by the charged student.

**c.** Allow the presence of an attorney as a student's advisor.

**d.** Will be recorded. This recording will serve as the official record of the proceedings.

**e.** A formal decision letter will be sent to the student within ten class days from the conclusion of the hearing process. This time limit may be extended if necessary where additional consideration of evidence and deliberation is required.

**f.** The following order of presentation is recommended for use in formal hearings. The hearing body may change the order if necessary.

**1.** Presentation of formal charges.

**2.** Opening statement by the University, followed by the opening statement of the charged student.

**3.** Presentation of evidence and witnesses by the University, followed by questioning of those witnesses by the hearing body and the charged student. Witnesses are then dismissed.

**4.** Presentation of evidence and witnesses by the charged student, followed by questioning of those witnesses by the charged student and the hearing body. Witnesses are then dismissed.

**5.** Questions directed to the charged student by the hearing body.

**6.** Closing statement by the University, followed by the closing statement of the charged student.

2. Informal hearings:

**a.** The University does not automatically call witnesses to support the charges, although the hearing body may gather any additional information needed, including calling witnesses. The student will be informed of any additional information gathered by the hearing body. The charged student may call witnesses and present evidence.

**b.** Are scheduled at the convenience of both the charged student and the hearing body.

**c.** Do not normally include the presence of an attorney as a student's advisor; if an attorney will be present, the hearing body must be informed at least two days in advance.

**d.** Brief written decisions (including findings of fact) will serve as records of informal hearings and will be communicated within ten class days of the hearing body's final meeting with the student. This time limit may be extended if necessary where additional consideration of evidence and deliberations are required.

**(e)** Hearing Bodies and Authorities. Any specific procedures used by hearing bodies will comply with the requirements of this Student Conduct Code. The range of available hearing bodies may differ on branch campuses.

**1.** The Director of Student Rights and Responsibilities and designee(s) may conduct both informal and formal hearings on individual or group cases.

**2.** A hearing officer designated by the Dean of Students may conduct both informal and formal hearings on individual or group cases.

**3.** The Dean of Students may conduct both informal and formal hearings on individual or group cases.

**4.** The Lower Student Court may conduct both informal and formal hearings on individual or group cases.

**5.** An Administrative Hearing Panel (composed of one faculty member appointed by the Dean of Students, one student appointed by the Student Government Association and one staff member designated by the Dean of Students) may conduct formal hearings on individual or group cases.

**6.** Interfraternity Council Judicial Board may conduct both informal and formal hearings regarding cases of an Interfraternity Council organization's alleged violation of the Student Conduct Code or Interfraternity Council Constitution. The Board may also provide information regarding individual cases related to a group case that is being heard to the Office of Student Rights and Responsibilities.

**7.** National Pan-Hellenic Council Judicial Board may conduct both informal and formal hearings regarding cases of a National Pan-Hellenic Council organization's alleged violation of the Student Conduct Code or National Pan-Hellenic Council Constitution. The Board may also provide information regarding individual cases related to a group case that is being heard to the Office of Student Rights and Responsibilities.

**8.** Panhellenic Council Judicial Board may conduct both informal and formal hearings regarding cases of a Panhellenic organization's alleged violation of the Student Conduct Code or the Panhellenic Constitution. The Board may also provide information regarding individual cases related to a group case that is being heard to the Office of Student Rights and Responsibilities.

**9.** University Housing hearing officers (Director, Associate Director, Assistant Directors and designee) may conduct both informal and formal hearings regarding cases involving arising in University Housing in which the charged student is a resident of University Housing.

**10.** University Housing Judicial Board(s) may conduct formal hearings regarding cases arising in University Housing in which the charged student is a resident of University Housing.

**(f)** Choice of hearing type and hearing body -- Students may normally choose both the hearing type and the hearing body to adjudicate their case subject to the restrictions stated in (e) above. Further restrictions to that choice include:

**1.** When it is determined that a case requires a formal record of proceedings, a formal hearing may be chosen by the Dean of Students or designee.

**2.** When two or more individual cases stem from the same incident, those cases should normally be heard by the same hearing body. In such cases, the Director of

Student Rights and Responsibilities may either pre-select the hearing type and hearing body or consult with the students involved before making the decision.

**3.** The Dean of Students or Director of University Housing or designee reserves the right to choose the appropriate hearing type and body based on the immediate circumstances.

**4.** During time periods in which any of the hearing bodies are not officially constituted, the Dean of Students or Director of University Housing or designee may choose an appropriate alternative as the hearing body.

**(8) Victims' Rights.**

**(a)** Victims' rights apply to the following types of cases:

**1.** Sexual Misconduct

**2.** Endangerment

**3.** Harassment

**4.** Hazing

**5.** Property (damage)

**6.** Property (theft)

**(b)** Rights

**1.** To have an advisor of the alleged victim's choice accompany her/him when presenting information to the hearing body and to any other relevant meetings held throughout the disciplinary process.

**2.** To submit a victim impact statement to the hearing body. This information would be used only in the sanctioning phase of deliberations, if the charged student is found responsible for the charge(s). If the charged student appeals the first-level decision on the basis of severity of the sanction imposed, he/she will have the right to view the victim impact statement upon request.

**3.** To have unrelated past behavior excluded from the hearing. The chair of the hearing body will decide if such information is unrelated.

**4.** To submit questions to the hearing body. The hearing body will then consider posing those questions to the charged student.

**5.** To testify in limited privacy, as long as the process does not compromise the charged student's right to confront and question witnesses. This option will be offered only by the Director of Student Rights and Responsibilibies.

**6.** To be present throughout the entire hearing, or portions thereof. This option will be offered only by the Director of Student Rights and Responsibilities.

**7.** To be notified of the outcome, including both the decision and the sanctions, of the disciplinary process.

**(9) Sanctions.**

**(a)** In light of the facts and circumstances of each case, the following sanctions, or combination of sanctions (with or without appropriate modifications) may be imposed upon any individual student found to have violated the Student Conduct Code:

**1.** Reprimand (written or verbal)

**2.** Work Hours -- assignment to complete tasks under the supervision of a University department or outside agency.

**3.** Educational activities -- attendance at educational programs, interviews with appropriate officials, planning and implementing educational programs, or other educational activities.

**4.** Counseling assessment -- referral for assessment at a counseling center for alcohol/drug dependence, general mental health, or other counseling issues.

**5.** Restitution.

**6.** Fees -- may not be levied in excess of $200.00.

**7.** Conduct Probation -- A period of time during which any further violations of the Student Conduct Code may result in more serious sanctions being imposed. Some of the restrictions that may be placed on the student during the probationary period include, but are not limited to: participation in student activities, representation of the

University on athletic teams or in other leadership positions, entrance into University residence halls or other areas of campus, or contact with another specified person(s).

**8.** Disciplinary Probation -- A period of time during which any further violation of the Student Conduct Code puts the student's status with the University in jeopardy. If the student is found "responsible" for another violation of the Code during the period of Disciplinary Probation, serious consideration will be given to imposing a sanction of Suspension, Dismissal, or Expulsion from the University. Some of the restrictions that may be placed on the student during the probationary period include, but are not limited to, participation in student activities, representation of the University on athletic teams or in other leadership positions, entrance into University residence halls or other areas of campus, or contact with another specified person(s).

**9.** Change in University residence hall assignment.

**10.** Exclusion (either temporary or permanent) from University residence halls.

**11.** Suspension -- Separation from the University for a specified period, not to exceed two years.

**12.** Dismissal -- Separation from the University for an indefinite period of time. Readmission is possible, based on meeting all readmission criteria and obtaining clearance from the Dean of Students or designee.

**13.** Expulsion -- Separation from the University without the possibility of readmission.

**14.** Withholding of diplomas, transcripts, or other records.

**15.** Transcript Notations -- a written notation indicating that disciplinary action was taken. This sanction may be applied only in cases in which the student has been permanently separated from the University.

**(b)** The following sanctions may be imposed upon groups or organizations found to have violated the Student Conduct Code:

**1.** Those sanctions listed in Section "a," Suspension, Dismissal, or Expulsion of student organizations includes loss of registration status.

**2.** Additional sanctions specific to student organizations are found in Greek and other organizational constitutions, and in the Office of Student Activities and Organizations' policies, which are hereby incorporated by reference.

**(c)** Any sanction that permanently separates a student from the University may be integrated into that student's academic transcript. A lesser sanction may not be integrated into the transcript.

**(10) Appeals.**

**(a)** Appellate Bodies.

**1.** Recommended decisions of the Lower Student Court may be appealed to the Student Supreme Court. During time periods in which the Student Supreme Court has not been officially constituted, the Dean of Students (or designee) will hear appeals of Lower Student Court decisions.

**2.** Recommended decisions of the Interfraternity Council, N.P.H.C., and Panhellenic Judicial Board cases may be appealed to the Dean of Students (or designee).

**3.** Recommended decisions of the Housing Judicial Board may be appealed to the Director of University Housing (or designee).

**4.** Recommended decisions of Administrative Hearing Panels may be appealed to the Dean of Students.

**5.** Decisions of the Director of Student Rights and Responsibilities (and designees) may be appealed to the Dean of Students (or designee).

**6.** Decisions of other hearing officers appointed by the Dean of Students may be appealed to the Dean of Students (or designee).

**7.** Decisions of hearing officers appointed by the Director of University Housing may be appealed to the Director of University Housing (or designee).

**8.** Decisions of the Dean of Students may be appealed to the Vice President for Student Affairs.

**9.** Decisions of the University President may be appealed to the First District Court of Appeals.

**(b)** Appeal Requests:

**1.** A written request should be submitted to the appropriate appellate officer (See Section "a") within five class days after the student is notified of the initial hearing decision.

**2.** The request should state the reason(s) for appeal (see "c" below), the supporting facts, and the recommended way to correct the error.

**(c)** Appeal considerations are limited to:

**1.** Due process errors involving violations of a charged student's rights (See Section 6) that substantially affected the outcome of the initial hearing.

**2.** Demonstrated prejudice against any party by the person presiding over the hearing. Such prejudice must be evidenced by a conflict of interest, bias, pressure, or influence that precluded a fair and impartial hearing.

**3.** New information that was not available at the time of the original hearing.

**4.** A sanction that is extraordinarily disproportionate to the offense committed.

**5.** The preponderance of the evidence presented at the hearing does not support a finding of "responsible." Appeals based on this consideration will be limited solely to a review of the record of the first-level hearing.

**(d)** Appellate Hearings:

**1.** Will be scheduled within ten class days of receiving the written request for appeal.

**2.** Will involve hearing the charged student and any witnesses called by the student; the appellate body may determine whether it needs to call any further witnesses or gather additional information.

**3.** Will be recorded; this recording will serve as the official record of the hearing.

**4.** The charged student may bring an advisor to the appellate hearing.

**5.** On appeal, the burden of proof rests with the student to clearly show that an error has occurred during the first level hearing process.

**(e)** Appellate Decisions:

**1.** The appellate body may affirm, modify, reverse, or remand the first-level decision, or order that a new hearing will be held.

**2.** Are recommended to the Vice President for Student Affairs. The Vice President (or designee) has the right to affirm, modify, or reverse the recommended decision, or to order a new hearing.

**3.** Are communicated within fifteen days of an appellate hearing, unless notification is given that additional time is necessary for consideration of the record on appeal.

**4.** Once approved by the Vice President, appellate decisions become final agency action.

**5.** Except in the case of an immediate suspension, the student's status will remain unchanged during the appellate process.

**(11) Records.**

**(a)** Records of all disciplinary cases will be maintained in the Office of Student Rights and Responsibilities and in University Housing. Records in which suspension or a less severe sanction is imposed shall be removed seven years from the date of final agency action on the case. Dismissal records shall be permanently retained as official records, unless the student is readmitted and successfully completes a degree, at which point the record should be removed five years beyond the date of readmission. Expulsion records shall not be removed from the official files under any circumstances. Any records kept beyond these limits for statistical purposes will not be considered or released as official disciplinary records.

**(b)** A student's prior disciplinary record will be considered only during the sanctioning phase of deliberations, not to determine whether or not to find the student "responsible" for the alleged violation.

**(c)** The release of student disciplinary records will be governed by applicable federal and state laws regarding the privacy of educational records. General information regarding the outcome of disciplinary proceedings (without identifying information) may be released to the public.

**(12) Immediate Suspension of a Student.** In certain circumstances involving a student's actions that may affect the safety, health, or general welfare of the student or the University community, the Vice President for Student Affairs, the Dean of Students, or their designee(s) may impose an immediate University suspension prior to the student's hearing with a hearing body. An immediate suspension means that a student cannot be on University property, cannot attend classes, and cannot use University facilities. The Director of University Housing has the authority to cancel a student's University Housing contract under a separate process.

**(a)** An immediate suspension requires that the student be notified in writing.

**(b)** The student has the opportunity for a speedy hearing regarding whether the immediate suspension should continue until a hearing is held on the facts of the case.

**(c)** If the student requests a hearing on the immediate suspension, the hearing will be held within three class days of the Dean of Students' receipt of the student's written request for a hearing. The Dean of Students or a designee will conduct the hearing.

**(d)** Formal disciplinary charges will be filed either when the immediate suspension is imposed or as soon thereafter as possible.

**(e)** Student organizations may be suspended by the Vice President for Student Affairs, the Dean of Students, or their designees, in circumstances involving actions related to that group that may affect the safety, health, or general welfare of its members or the University community. The affected group has the right to a speedy hearing as described in "(b)" and "(c)" above.

*SPECIFIC AUTHORITY: 240.227(1), 240.261, F.S.*
*LAW IMPLEMENTED: 228.093(1), 240.133, 240.202,*
*240.237,240.261(1), 240.262, F.S.S*

*HISTORY: New: 9/30/75, Amended 9/4/86, 3/20/88, __/__/__*

# RUTGERS UNIVERSITY, NEW BRUNSWICK, N.J. CAMPUS

## POLICY ON ACADEMIC INTEGRITY
## FOR
## UNDERGRADUATE AND GRADUATE STUDENTS

### I. ACADEMIC INTEGRITY:

Academic freedom is a fundamental right in any institution of higher learning. Honesty and integrity are necessary preconditions of this freedom. Academic integrity requires that all academic work be wholly the product of an identified individual or individuals. Joint efforts are legitimate only when the assistance of others is explicitly acknowledged. Ethical conduct is the obligation of every member of the university community, and breaches of academic integrity constitute serious offenses.

Maintenance of the standards of academic honesty and the successful administration of this policy depend on the mutual cooperation of faculty and students. Dissemination of the University Integrity Policy to all faculty, staff, and students will ensure that all members of the community are informed about academic integrity.

Faculty cooperation is essential for successful application of the procedures defined by the Academic Integrity Policy. Faculty members can help promote academic integrity by making clear on their syllabi their expectations concerning homework assignments, collaborative student efforts, research papers, examinations, and the like. Efforts should be made to detect and to prevent cheating and plagiarism in all academic assignments. If faculty members have evidence of academic dishonesty, they are expected to report such evidence promptly.

Students must assume responsibility for maintaining honesty in all work submitted for credit and in any other work designated by the instructor of the course. Students are also expected to report incidents of academic dishonesty to the instructor or dean of the instructional unit. This policy seeks to demonstrate the university's concern with academic dishonesty and to guarantee a fair procedure for resolving complaints of academic dishonesty.

## II. VIOLATIONS OF ACADEMIC INTEGRITY:

The various ways in which academic honesty can be violated are discussed below. The comments and examples within each section provide explanations and illustrative material, but do not necessarily exhaust the scope of these violations.

### A. Cheating

Cheating is the use of inappropriate and unacknowledged materials, information, or study aids in any academic exercise. The use of books, notes, calculators, conversation with others is restricted or forbidden in certain academic exercises. Their use in these cases constitutes cheating. Similarly, students may not request others (including commercial term paper companies) to conduct research or prepare any work for them, nor may they submit identical work or portions thereof for credit or honors more than once without prior approval of the instructor.

### B. Fabrication

Fabrication is the falsification or invention of any information or citation in an academic exercise. "Invented" information may not be used in any laboratory experiment or other academic exercise without authorization from the instructor. It is improper, for example, to analyze one sample in an experiment and covertly "invent" data based on that single experiment for several more required analyses. The student must also acknowledge reliance upon the actual source from which cited information was obtained. A writer should not, for example, reproduce a quotation from a book review and indicate that the quotation was obtained from the book itself.

## C. Facilitating Academic Dishonesty

Students who knowingly or negligently allow their work to be used by other students or who otherwise aid others in academic dishonesty are violating academic integrity. Such students are as guilty of intellectual dishonesty as the student who receives the material even though they may not themselves benefit academically from that dishonesty.

## D. Plagiarism

Plagiarism is the representation of the words or ideas of another as one' s own in any academic exercise. To avoid plagiarism, every direct quotation must be identified by quotation marks or by appropriate indentation and must be promptly cited in the text or in a footnote. Acknowledgment is required when material from another source stored in print, electronic, or other medium is paraphrased or summarized in whole or in part in one's own words. To acknowledge a paraphrase properly, one might state: "to paraphrase Plato's comment..." and conclude with a footnote identifying the exact reference. A footnote acknowledging only a directly quoted statement does not suffice to notify the reader of any preceding or succeeding paraphrased material. Information which is common knowledge, such as names of leaders of prominent nations, basic scientific laws, etc. need not be footnoted; however, all facts or information obtained in reading or research that are not common knowledge among students in the course must be acknowledged. In addition to materials specifically cited in the text, only materials that contribute to one's general understanding of the subject may be acknowledged in the bibliography. Plagiarism can, in some cases, be a subtle issue. Any questions about what constitutes plagiarism should be discussed with the faculty member.

### E. Denying Others Access to Information or Material

It is a violation of academic integrity to deny others access to scholarly resources, or to deliberately impede the progress of another student or scholar. Examples of offenses of this type include: giving other students false or misleading information; making library material unavailable to others by stealing or defacing books or journals, or by deliberately misplacing or destroying reserve materials; or altering computer files that belong to another.

## III. ACADEMIC DISHONESTY OFFENSES AND SANCTIONS:

Any violation of academic honesty is a serious offense and is therefore subject to an appropriate penalty. Violations at Rutgers University are classified into four levels according to the nature of the infraction. For each level of violation a corresponding set of sanctions is recommended. Deans, hearing panels and hearing officers are not bound by these illustrations, which are intended as general guidelines for the academic community. Since adherence to a code of conduct can be seen as a function of socialization into the group whose norms are reflected in such a code, culpability may be assessed differentially for those with more and less experience as members of the academic community; thus, violations of academic integrity by graduate students will presumably be penalized more severely than violations by first semester freshmen. Examples are cited below for each level of violation. These examples, too, are illustrations and are not to be considered all-inclusive.

LEVEL ONE

A. Violations

Level one violations may occur because of inexperience or lack of knowledge of principles of academic integrity on the part of persons committing the violation. These violations are likely to be involve a small fraction of the total course work, are not extensive, and/or occur on a minor assignment. Cases involving level one violations may to be heard by discipline panels of the colleges and schools in New Brunswick.

Examples:

1) Working with another student on a laboratory or other homework assignment when such work is prohibited.

2) Failure to be footnote or give proper acknowledgment in an extremely limited section of an assignment.

B. Recommended Sanctions

Sanctions for level one violations are listed below; one of these may to be chosen in each case:

1) Required attendance in a non-credit workshop or seminar on ethics or related subjects.

2) An assigned paper or research project on a relevant topic.

3) A make-up assignment at a more difficult level than the original assignment.

4) A recommendation to be the instructor that no credit to be given for the original assignment.

Records of students who commit level one offenses will to be maintained in the office of the New Brunswick Disciplinary Officer and in the respective deans' offices until graduation.

## LEVEL TWO

A. Violations

Level two violations are characterized by dishonesty of a more serious character or which affects a more significant aspect or portion of the course work. Cases involving level two violations may to be heard by discipline panels of the college in which the student is a candidate for a degree, or, in the case of a student who is not a candidate for a degree, by the disciplinary panel of such unit as will to be assigned by the Office of the Provost in New Brunswick.

Examples:

1) Quoting directly or paraphrasing, to be a moderate extent, without acknowledging the source.

2) Submitting the same work or major portions thereof to be satisfy the requirements of more than one course without permission from the instructors.

3) Using data or interpretative material for a laboratory report without

acknowledging the sources or the collaborators. All contributors to be preparation of data and/or to be writing the report must to be named.

4) Receiving assistance from others, such as research, statistical, computer programming, or field data collection help that constitutes an essential element in the undertaking without acknowledging such assistance in a paper, examination or project.

B. Recommended Sanctions

The recommended sanction for level two violations is academic dishonesty probation. In cases of academic dishonesty involving out-of-class assignments, the panel may recommend a failing grade for the assignment involved and the grade in the course will to be determined in the normal manner. However, cheating on a take-home final examination would normally carry a recommended penalty that the faculty member fail the student in the course, as well as academic dishonesty probation. The student will remain on probation for the remainder of the semester in which the violation occurs; should the violation occur after the tenth week of a semester, the sanction will to be in force during the semester following. Should the violation occur in the final semester of enrollment before the awarding of the degree, the transcript will carry a notation of a disciplinary offense for a period not to be exceed one semester.

Notation of "academic dishonesty probation" will to be placed on the student's transcript and will remain for the period in which the sanction is in force. Records of students who commit level two offenses will to be maintained in the Office of the New

Brunswick Disciplinary Officer and in the respective deans' offices until graduation, or until a date specified in the sanction.

## LEVEL THREE

### A. Violations

Level three violations are those that go beyond level one or two and that, in the opinion of the College Hearing Officer or Dean, require adjudication at the university level. Level three violations include dishonesty that affects a major or essential portion of work done to be meet course requirements, or involves premeditation, or is preceded by one or more violations at levels one and two. Cases involving level three violations are heard under the University Student Disciplinary Hearing Procedures. Examples:

1) Copying on hourlies or final examinations.
2) Plagiarizing major portions of a written assignment.
3) Acting to be facilitate copying during an exam.
4) Using prohibited materials. e.g., books, notes, or calculators during an examination.
5) Collaborating before an exam to be develop methods of exchanging information and implementation thereof.
6) Altering examinations for the purposes of regrading.
7) Acquiring or distributing an examination from unauthorized sources prior to be the examination.
8) Presenting the work of another as one's own.
9) Using purchased term paper or other materials.

10) Removing posted or reserved material, or preventing other students from having access to be it.

11) Fabricating data by inventing or deliberately altering material (this includes citing "sources" that are not, in fact, sources of borrowed material).

12) Using unethical or improper means of acquiring data.

B. Recommended Sanctions

The sanction typically to be to be sought for all level three violations or repeated violations of level one and two offenses is a minimum of a one semester suspension from the university. Notation of "academic disciplinary suspension" will to be placed on a student's transcript and remain for the designated period.

LEVEL FOUR

A. Violations

Level four violations represent the most serious breaches of intellectual honesty. Such cases are heard under the University Student Disciplinary Hearing Procedure.

Examples:

1) All academic infractions committed after return from suspension for a previous academic honesty violation.

2) Infractions of academic honesty in ways similar to be criminal activity (such as forging of a grade form, stealing an examination from a professor or from a university office or buying an examination, or falsifying a

transcript to be secure entry into the university or to be change the record of work done at the university).

3) Having a substitute take an examination or taking an examination for someone else.

4) Fabrication of evidence, falsification of data, quoting directly or paraphrasing without acknowledging the source, and/or presenting the ideas of another as one's own in a senior thesis, within a master's thesis or doctoral dissertation, in scholarly articles submitted to be refereed journals, or in other work represented as one's own as a graduate student.

5) Sabotaging another student's work through actions designed to be prevent the student from successfully completing an assignment.

6) Willful violation of a canon of the ethical code of the profession for which a graduate student is preparing shall to be considered a "heinous act" under the University Student Disciplinary Hearing Procedure and shall to be prosecuted accordingly.

B. Recommended Sanctions

The typical sanction for all level four violations and a repeat infraction at level three is permanent expulsion from the university. Such cases are heard under the University Student Disciplinary Hearing Procedure. Notation of "academic disciplinary separation" will to be placed on a student's transcript and remain permanently.

C. Reporting of Recommended Sanctions

Students committing acts of academic dishonesty not only face university censure but run a serious risk of harming their future educational and employment opportunities. In addition to be the notation for a specific sanction placed on the student's transcript and which remains for the term of the sanction, prospective employers and other educational institutions frequently use recommendation forms that ask for Judgment and comment on an individual's moral or ethical behavior. Since such forms are sent with the permission of the student, university faculty and administrators knowledgeable of academic dishonesty infractions are ethically bound to be report such incidences. In all cases in which a grade of "F" is assigned for disciplinary reasons, moreover, the F" will remain on the student's transcript, even if the course is retaken and a passing grade is achieved.

## IV. ADMINISTRATION OF THE ACADEMIC INTEGRITY POLICY:

### A. Committee on Academic Integrity

The New Brunswick Committee on Academic Integrity will to be responsible for monitoring the policy of academic integrity, and will serve as a hearing appeals board for all cases of academic dishonesty in New Brunswick that do not involve separation from the university. The committee shall meet at least twice a semester on a schedule to be to be publicly announced.

The Provost shall appoint five tenured faculty members and four students to be serve on the Committee for staggered terms. The members of the Committee will to be chosen from the various units in New Brunswick. The Committee elects its own chair.

### B. Disciplinary Officer

Primary responsibility for coordinating the administration of the Academic

Integrity Code will to be assumed by a staff member of the Office of the Provost who will serve as New Brunswick Disciplinary Officer. This officer, working with the Office of the Assistant Vice President for Student Life Policy and Services and with the deans or their designates, will inform all members of the New Brunswick community of this policy, establish a system to be inform students of the components and requirements of intellectual integrity, and ensure that training sessions are conducted for faculty members and students who serve on the local hearing panels. The New Brunswick Disciplinary Officer will resolve any questions concerning the appropriate level of a committed offense, subject to be review by the Assistant Vice President for Student Life Policy and Services, decide on the merits of appeal cases, act on behalf of the Committee on Academic Integrity in scheduling and administering the hearing of appeals growing out of cases at levels one and two, and monitor annually the cases and the decisions of all hearing panels.

C. Faculty and College/School Discipline Panels

At the beginning of each academic year, each faculty or college/school with faculty in New Brunswick has the responsibility for forming a faculty pool from which disciplinary panels consisting of faculty and students to be hear cases of academic dishonesty will to be drawn. Each panel will consist of three faculty. The majority will to be drawn from the pool of the unit bringing the charge. However, at least one faculty member must to be a faculty fellow of the student's degree granting unit.[1] In the case of degree-granting units having their own faculty and having a charge brought against their student by a member of another unit, two of the faculty members of the panel shall to be drawn from the pool of the faculty unit bringing the charge. Two student panel members will to be selected from pools established each year by the student government associations or the equivalent in each degree-granting unit. Student panel members for hearing boards shall to be drawn from the pool of the unit of the student who is charged with an offense.

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[1] For cases involving Douglass, Livingston, Rutgers or University College students, at least one of the faculty members on the panel will to be a faculty member or fellow of the student's degree-granting unit. In cases involving business majors who will receive joint degrees

The dean of the degree-granting unit, or his/her designate, will select the members of the appropriate pool for the panel for each case. The overall intention of this selection process is to be find an impartial panel that possesses no preconceived views as to be the validity of the charges and is willing to be listen to be the evidence presented with an open mind before reaching a decision based on that evidence. Normally, panel members will not to be members of the department or program involved in bringing the allegations, nor will they to be personally acquainted with the student against whom complaints are made. However, wherever possible faculty members should to be chosen for the appropriateness of their expertise to be the case under consideration (e.g. a physicist for a case involving the Mathematics department, an anthropologist for sociology, etc.). The student has the right to be object to be the dean of the degree-granting unit, for good

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from the business school and from a college, a business faculty member, preferably a faculty fellow from the student's liberal arts college, will serve in this slot.

cause, about the composition of the panel. All parties will to be entitled to be at least five[2] working days' notice of the hearing.

### D. Complaint Procedure

Evidence of academic dishonesty should initially to be brought to be the attention of the instructor or to be the dean of the degree-granting unit or his/her designate, but any member of the academic community may present evidence of academic dishonesty to be the dean. If a student reports a breach of the policy, the instructor of the course is obliged to be cooperate in undertaking an investigation. If a student (or students) from only one degree-granting unit is involved, the case will to be assigned to be the dean of the student's (or students') degree-granting unit. If students from more than one degree-granting unit are involved, the New Brunswick Disciplinary Officer, subject to be review by the Assistant Vice President, will assign the case to be the dean of that degree-granting unit which is, in the New Brunswick Disciplinary Officer's view, the most appropriate for the case in question. The dean, or a designate, will conduct a preliminary investigation of the complaint ordinarily within fifteen working days. S/he will discuss the offense with the student, being certain to be notify the student of his/her rights, the nature of the offense, and the sanctions suited to be the offense if proven. If the student admits dishonesty, the dean or his/her designate will determine the appropriate sanction as set forth in Section III in consultation with the instructor involved. The dean or his/her designate will inform the New Brunswick Disciplinary Officer of the disposition of the case. If the student makes some other plea, or no plea at all, the dean or his/her designate will remand the case to be a disciplinary panel of the unit and notify the New Brunswick Disciplinary Officer.

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[2] A "working day" is any day, except Saturday or Sunday, which is not listed as a university holiday on the university calendar for that year, and which has not been declared a holiday by the President of the university or his/her designated representative, and on which classes are in session.

Any questions concerning the appropriate level of a particular offense should to be referred to be the New Brunswick Disciplinary Officer who, in consultation with the Assistant Vice President, will make a determination.

Students may continue to be participate in a course or research activities until the case has been adjudicated. Under no circumstances should a student to be offered a choice of either dropping a course or facing disciplinary action.

All disciplinary proceedings are confidential. Faculty members and students are cautioned not to be discuss cases of academic dishonesty outside of the legitimate hearings prescribed by the policy.

If the penalty for an offense is one for which the sanction is separation from the university, (level three and level four), the dean of the degree-granting unit will notify the New Brunswick Disciplinary Officer and send the case to be the Office of the Assistant Vice President for Student Affairs to be to be heard under the University Student Disciplinary Hearing Procedure.

## V. HEARING GUIDELINES:

The following guidelines should to be followed in all unit-level hearings:

1. Students entitled to be a hearing shall to be informed of the hearing date

and the specific charges at least five working days in advance of the hearing.

2. A hearing panel consisting of three faculty members and two student members as defined above shall to be convened by the dean or designate of the degree-granting unit which is hearing the case. At least two faculty members and one student member of the panel must to be present. Replacements may to be selected from the designated pool of faculty and students who have agreed to be serve on such panels. The dean or a designate shall serve as the presiding officer, but shall not vote.

3. Written applications setting forth good cause may to be made to be the dean for a postponement of a scheduled hearing. Except in emergency situations, no application shall to be considered unless received at least three working days before a scheduled hearing. The dean or a designate will determine good cause.

4. Students who fail to be appear at the initial hearing and fail to be inform the presiding officer of intent to be appear at a rescheduled hearing will to be assigned a sanction(s) appropriate to be the offense and to be so informed in writing. The sanction will to be in effect until the case can to be adjudicated.

5. Each student charged, and the instructor or student bringing the charge, may bring an adviser, selected from within the university community, but must present his/her own case. In a case involving a teaching assistant, the

instructor in charge of the course should also to be present, and may assist in the presentation.

6. Both the complainant and the student(s) charged may bring witnesses. The names of the witnesses that the college will bring forth should to be given to be the student charged, at least three working days in advance of the hearing. Only witnesses whose testimony is relevant to be the substantive issues will to be allowed to be testify.

7. Each party may ask questions of the other, and of the witnesses. The members of the panel may question these witnesses and each party. Any witness expected to be testify shall to be excluded during the presentation of other evidence at the hearing.

8. The hearing is closed to be the public unless the student(s) charged request an open hearing.

9. Any person, including the respondent, who interrupts a hearing or who fails to be adhere to be the rulings of the presiding officer may to be excluded from the proceeding.

10. All hearings will to be tape-recorded by the local unit. Such tape recording will not to be public but may to be used by the New Brunswick Disciplinary Officer in making a determination on an appeal.

11. The panel shall find the student guilty if the preponderance of the evidence so indicates. Its decision shall to be by majority vote and all panel members hearing the case must vote yea or nay.

12. The dean or his/her designate (the presiding officer) will notify all parties concerned in writing, including the New Brunswick Disciplinary Officer and the dean, where necessary, of the unit in which the student is enrolled, of its decision within five working days.

## VI. HEARING APPEAL PROCEDURES:

Appeals of hearing panel decisions at levels one and two must to be filed with the New Brunswick Disciplinary Officer; appeals at levels three and four must to be filed with the Assistant Vice President for Student Affairs.

Appeals can only to be submitted on the basis of the alleged violation of due process or on the basis of new substantive evidence. The New Brunswick Disciplinary Officer will decide whether or not an appeal should to be heard. Pending the disposition of the appeal, the pre-hearing status of the student(s) remains unaltered.

The following instructions apply to be hearing appeals:

1. Appeals must to be made in writing and directed to be the New Brunswick Disciplinary Officer within five working days after the panel's decision is rendered. The Disciplinary Officer will decide on the merits of the appeal within ten working days after the receipt of the panel's decision. If the Disciplinary Officer's decision is affirmative the appeal will to be heard by the New Brunswick Committee on Academic Integrity.
2. The New Brunswick Committee on Academic Integrity will hear appeals at its next regularly scheduled meeting. A majority must to be present and

all, including the chair, will vote yea or nay. The Committee's decision shall to be final. The chair will inform all appropriate persons of the Committee's decision.

## VII. AMENDMENTS TO THE INTEGRITY CODE:

### A. Minor Changes

The New Brunswick Committee on Academic Integrity may recommend minor changes which will go into effect at the beginning of the next academic year, providing that all units have been informed of the proposed changes and none has objected that the changes are major ones.

### B. Major Changes

Major changes, like minor ones, may to be proposed by any unit for consideration by the New Brunswick Committee on Academic Integrity. If units representing three-fifth's of the total number of faculty members and three-fifth's of the units in New Brunswick approve the proposed changes, then the changes will become part of the policy.

## Afterword

The Policy on Academic Integrity was developed by a committee composed of representatives from all the undergraduate and graduate schools of the New Brunswick Campus. Comments and suggestions were made by the Deans, faculty, students, and staff members in the various academic units and in the Office of the Provost. The academic integrity regulations of many other major public institutions were consulted. The university is indebted to be all those who have contributed their ideas to this policy. Requests for additional copies should to be directed to be either the collegiate Dean of Students or the New Brunswick Disciplinary Officer.

Revised June 8, 1987

## III. SELECTED LEGAL DECISIONS

1. *The State ex ref. The Miami Student et al. v. Miami University et al.*, 79 Ohio St. 3d 168, 680 N.E. 2d 956 (July 9, 1997)

2. *Smith v. Denton*, 895 SW2d 550 (Ark. 1995)

3. *Siblerud v. Colorado State Board of Agriculture*, 896 F. Supp. 1506 (D. Colo. 1995)

4. *Fellheimer v. Middlebury College*, 869 F. Supp. 238 (D. Vt. 1994)

5. *Illickal v. Roman*, 653 N.Y. S. 2d. 562, (Feb. 11 1997)

6. *Moukarzel v. Montefiore Medical Center*, 652 N.Y.S. 2d 281, (Jan. 14, 1997)

7. *University of Texas Medical School at Houston v. Than*, 834 SW2d 422 (Tex. App. Houston [1st Dist.] 1994)

# The State ex ref. The Miami Student et al.

## v.

## Miami University et al.

79 Ohio St. 3d 168, 680 N.E. 2d 956
(July 9, 1997)

Editors of the university's student newspaper brought a mandamus action to obtain full disclosure of records of student disciplinary proceedings for certain years. The students intended to use these records to develop a data base and to track student crime trends on campus. While the university released copies of the university disciplinary board (UDB) records, relying on the confidentiality provisions of the Family Educational Rights and Privacy Act (FERPA), university officials deleted information pertaining to the sex, age of the accused and date, time and location of the incidence. The students objected claiming that the university should provide them with complete copies of public records requested redacted only for the name and social security number or student ID number.

The court found that the records were not educational records under federal law and that the students were entitled to them minus a student's personal information. The university argued that the records are exempt from release under federal law. The court ruled that the university disciplinary board proceedings are non-academic in nature. The records therefore do not contain educational related information, such as grades or other academic data and are unrelated to academic performance, financial aid or scholastic performance. Moreover, the court noted that crimes and other student misconduct are escalating at campuses across the Nation. "For potential students, and their parents, it is imperative that they are made aware of all campus crime statistics and other types of student misconduct in order to make an intelligent decision of which university to attend. Likewise, for students already enrolled in a university, their safety is of utmost importance. Without full public access to disciplinary proceeding records, that safety may be compromised." Finally, the court stated that its decision "fosters openness" and would encourage "free flow of information where it is not prohibited by law."

# Smith

# v.

# Denton

895 SW 2d 550 (Ark. 1995)

In this case, a freshman honor student with no prior disciplinary record was given a three-year suspension by the University of Central Arkansas (UCA) for a violation of its firearms policy. The policy provided in part that "any student possessing, storing or using a firearms on university controlled property or at a university-sponsored or supervised function, unless authorized by the university, will be suspended from UCA for a period of not less than three years unless a waiver of the suspension is granted by the President upon the recommendation of the Vice President for Student Affairs." The 1992 policy was issued after several firearms incidents on campus. The student brought an action against the university, members of the administration and Board of Trustees, seeking a stay and injunction of the suspension. The student's car was stopped by an off-campus police officer who found a semi-automatic weapon in her car. She alleged that the weapon was placed in her vehicle without her knowledge. No police action was taken against the student. When campus officials learned of the incident, the student was immediately suspended. The suspension continued despite testimony before the student judicial board that the car was borrowed by a non-student to go target shooting and that the gun was left in a bookbag in the student's car without her knowledge.

The Chancery Court of Faulkner County found that the university firearms policy was void as violative of substantive due process, and set aside the suspension, but refused to award the student damages and attorney's fees.

On appeal, the Supreme Court of Arkansas held that:

- The university failed to afford procedural due process to the student by failing to follow its own prescribed disciplinary standards; and
- The student was not entitled to damages because the University did not act with malice or act in reckless disregard of the student's rights.

# Siblerud

# v.

# Colorado State Board of Agriculture

896 F. Supp. 1506 (D. Colo.)

In this case, a graduate student at Colorado State University (CSU) was dismissed from the graduate program after he represented in a submission to a academic journal that his article was based on a dissertation in progress at CSU despite being instructed not to do so. The student sued CSU faculty and administration responsible for the dismissal, under the federal civil rights laws. The administration moved for summary judgment. The United States District Court for the District of Colorado held that, while the student was given notice of the decision to dismiss him, the basis for the decision and the right to appeal, the procedure did not include a pre-termination hearing which would have provided additional safeguards against erroneous decisions. The university did not face a situation where it was required to make a prompt decision on termination. Thus, it could have afforded the student the opportunity for a pre-termination hearing.

# Fellheimer

# v.

# Middlebury College

869 F. Supp. 238 (D. Vt. 1994)

In this case, student Fellheimer was accused of rape by a female student. The Vermont State Attorney General declined to prosecute Fellheimer on the rape charge. Middlebury College suspended him for one year finding him not guilty of rape but guilty of "disrespect of persons" and engaging in "inappropriate sexual activity."

The United States District Court for the district of Vermont concluded that the college breached its contractual duties to inform the student of disciplinary charges against him with particularity by charging him with rape without informing him that, even if his conduct did not amount to rape, it could still be found to violate the student handbook provision prohibiting "disrespect of persons."

Further, the court ruled that the college was not contractually bound to provide students subject to disciplinary proceedings with procedural protections equivalent to those required under federal and state constitutions. Rather, the college could breach its obligations only by deviating from its own procedures in such a way that the disciplinary action at issue was fundamentally unfair, arbitrary or capricious. In this case, the student handbook stated that due process would be afforded "insofar as the procedures of the college permit" and that the student's due process rights could not be "coextensive or identical to the rights supported in a civil or criminal legal proceeding." Therefore, Fellheimer could not recover from the college for breach of contract based on action taken during the course of the disciplinary proceedings which conformed to procedures set forth in the student handbook.

Further, the court ruled that the charge of "disrespect of persons" was not too vague to form the basis of disciplinary action because the handbook on which the student relied clearly indicated that respect for persons and property was expected and that a violation of that provision in the student handbook could result in dismissal.

Finally, the court ruled that under Vermont law, the college's decision, when confronted with a female student's accusation of rape, to confront the male student with the charge, to hold a hearing, and to support findings of the initial tribunal on appeal, was not such extreme and outrageous conduct as would support the student's claim for intentional inflection of emotional distress even though procedural errors were alleged.

# Illickal

# v.

# Roman

653 N.Y. S. 2d. 562
(Feb. 11 1997)

The New York Supreme Court, Appellate Division dismissed a petition for reinstatement by medical student in this case. The court held that the student's dismissal from a medical school for academic deficiencies would not be disturbed by the court, absent demonstrated arbitrariness, capriciousness, irrationality, constitutional or statutory violation, or bad faith. Further, the court ruled that the process afforded the student before his dismissal satisfied the requirements of due process because he was advised of his academic deficiencies and given several opportunities to correct those deficiencies before he was dismissed, and he was given adequate opportunity to attend and participate in his appeal before the school's appellate committee. Finally, the New York Supreme Court ruled that it lacked subject matter jurisdiction over the student's breach of contract claim as such jurisdiction was conferred exclusively on the court of claims.

# Moukarzel

## v.

# Montefiore Medical Center

652 N.Y.S. 2d 281
(Jan. 14, 1997)

In this case a former resident in urology residency training program sponsored by Montefiore Medical Center was dismissed from the program on the grounds of inadequate knowledge, clinical skill and competence. The resident began this action alleging discrimination based on his Lebanese national origin and breach of contract, seeking reinstatement to the program. The New York Supreme Court, Appellate Division, noted that judicial deference is given to educational and academic institutions and also to accredited residency training programs. In reviewing the records in this case it was found that several faculty members assessed the plaintiff's knowledge, clinical skill and competence as inadequate or borderline, and his scores on two successive American Urological Association in-service examination were far below the national average. The plaintiff did not submit sufficient evidence to raise a genuine issue respecting defendant's alleged discriminatory basis for his discontinuance in the residency program, and summary judgment was granted for the defendant -- Montefiore Medical Center.

The plaintiff claimed that he was denied due process at a meeting of the Resident Review Committee because he had "no opportunity to question the committee members, to present witnesses on his behalf, introduce documents or present other evidence." The court ruled that the plaintiff's claim is without merit because "like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision-making."

Finally, the court ruled that there was no abuse of discretion in denying the plaintiff's motion to compel the defendants to respond to a discovery request first made one and one-half years after the action was commenced when no justifiable excuse for the delay was submitted.

# University of Texas Medical School at Houston

## v.

## Than

834 SW 2d 422
Tex App. Houston [1 Dist.] 1994

The Court of Appeals of Texas affirmed the District Court ruling which granted a permanent injunction obtained by a medical student. At trial, the court ordered (1) removal of the student's "F" assigned to him as a grade on a surgery exam, (2) removal from his records of all documents showing the student's expulsion from the medical school and all documents evidencing the charge of cheating; (3) treat the student as one who graduated in good standing when responding to requests for information from residency programs and potential employers; and (4) issue the student a diploma and all documents necessary for his participation in the residency program.

The court said that students facing dismissal are entitled to procedural due process. Dismissal for academic reasons "calls for far less stringent procedural requirements" than for dismissal for disciplinary reasons.

The Court of Appeals disagreed with the University of Texas' assertion that the student's dismissal for cheating on the Nation Board of Medical Examiners exam was for academic and not disciplinary reasons. The Court explained that "cheating is a misdeed. Dismissal for a misdeed, however, is punitive. It is therefore disciplinary, not academic. A dismissal for the misdeed of cheating is a disciplinary dismissal." Given the nature of the dismissal for disciplinary reasons, the student was entitled to notice of the charges, notice of the evidence to be used against him, and a hearing was required.

## IV. SELECTED LAW REVIEW AND LEGAL PERIODICALS

1. "Due Process Rights in Student Disciplinary Matters," by Lisa L. Swen.

2. "Students' Rights to Counsel in University Disciplinary Proceedings," by Douglas R. Richmond.

3. "Judicial Responses to Adverse Academic Decisions Affecting Public Postsecondary Institution Students Since *Horowitz* and *Ewing*, by Deborah L. Ford and John L. Strope, Jr.

4. "Academic Honor Codes: A Legal and Ethical Analysis," by Larry A. DiMatteo and Don Wiesner.

5. "The Constitution Comes to Campus Due Process and Student Disciplinary Rules," Part I, by Elaine L. Chan and James B. MacRobbie.

6. "Protecting Student Disciplinary Codes from Due Process Challenges," Part II, by Elaine L. Chan and James B. MacRobbie.

7. "Litigation Involving Higher Education Employee and Student Handbooks, by Ralph D. Mawdsley.

8. "Redefining the Contour of University Liability: The Potential Implications of *Nero v. Kansas State University*," by Brian A. Snow and William E. Thro.

9. "The College's Emerging Duty to Supervise Students *In Loco Parentis* in the 1990s," by Philip M. Hirshberg.

10. "Consensual Sexual Relations Between Faculty and Students in Higher Education," by Jerome W.D. Stokes and D. Frank Vinik.

11. "*Vernonia School District 47J v. Wayne Acton*: Lessons for Colleges and Student Athletes," by Valerie L. Brown.

12. "Case Studies of Wrongdoing on Campus: Ethics and the Lawyer's Role," by Stephen S. Dunham.

# DUE PROCESS RIGHTS IN STUDENT DISCIPLINARY MATTERS

## INTRODUCTION

Student disciplinary proceedings[1] frequently intimidate college and university officials as well as students. In institutions of higher education bound by the due process clause,[2] the possibility of legal action exists when a university official neglects to ensure a student's due process rights. Since the Fifth Circuit's landmark decision in *Dixon v. Alabama State Board of Education*,[3] federal courts have consistently held that due process requires that tax-supported universities give students notice and the opportunity for a hearing before expulsion for misconduct. The United States Supreme Court has offered little guid-

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[1] While penalties for disciplinary violations vary, due process concerns most frequently arise when educational institutions impose the more serious penalties of suspension or expulsion. *See* Herman v. University of S.C., 457 F.2d 902, 903 (4th Cir. 1972) ("Expulsion is the 'capital punishment' of university discipline."), *aff'g*, 341 F. Supp. 226 (D.S.C. 1971).

[2] This article will not compare the rights of students in private colleges or universities with those in public institutions. At most private institutions, a student handbook, disciplinary code of conduct, or similar document usually grants some due process rights to the student. Consequently, a student in a private institution may bring suit for breach of contract if denied due process as stated in the handbook. *See* Cloud v. Trustees of Boston Univ., 720 F.2d 721, 724 (1st Cir. 1983); Slaughter v. Brigham Young Univ., 514 F.2d 622, 626 (10th Cir. 1975), *cert. denied*, 423 U.S. 898 (1975); Fussell v. Louisiana Business College of Monroe, 478 So. 2d 652, 654 (La. App. 1985).

Students have also successfully challenged disciplinary proceedings in private universities by using the "state action" theory under the fourteenth amendment and 42 U.S.C. § 1983. *See generally* Thigpen, *The Application of Fourteenth Amendment Norms to Private Colleges and Universities*, 11 J.L. & EDUC. 171 (1982); Annotation, *Action of Private Institution of Higher Education as Constituting State Action, or Action Under Color of Law, for Purposes of Fourteenth Amendment and 42 U.S.C.S. § 1983*, 37 A.L.R. FED. 601 (1978).

[3] 294 F.2d 150, 158 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961). In *Dixon*, five students who had participated in civil rights demonstrations were expelled from Alabama State College without notice, hearing, or appeal. Because *Dixon* introduced constitutional safeguards into the area of student discipline, the United States Supreme Court acknowledged the case as a "landmark decision." Goss v. Lopez, 419 U.S. 565, 577 n.8 (1975). The Fifth Circuit referred to *Dixon* as "[t]he classic starting point for an inquiry into the rights of students at state educational institutions of higher learning." Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992, 999 (5th Cir. 1975). *See also* Blanton v. State Univ. of N.Y., 489 F.2d 377, 385 (2d Cir. 1973) (referring to *Dixon* as a "path-breaking decision"); Jones v. Tennessee State Bd. of Educ., 279 F. Supp. 190, 197 (M.D. Tenn. 1968) ("The leading case involving . . . a disciplinary proceeding. . . .").

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ance on this issue. In *Goss v. Lopez*,[4] the Court followed *Dixon* and held that "[a]t the very minimum, students facing some kind of suspension . . . must be given *some* kind of notice and *some* kind of hearing."[5] Although the *Goss* facts confined the holding to ten-day suspensions of public high school students, the Court ventured that "more formal procedures" may be required for longer suspensions or dismissals.[6] In *Board of Curators of the University of Missouri v. Horowitz*,[7] the United States Supreme Court limited the *Goss* due process requirements to suspensions and dismissals for misconduct. While ruling that dismissals for academic inadequacy need "far less stringent procedural requirements,"[8] the *Horowitz* decision lacked clear guidelines to distinguish between academic and disciplinary matters.[9]

The ambiguities of *Goss* and *Horowitz* have generated a myriad of challenges to school-imposed sanctions for alleged student misconduct.

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[4] 419 U.S. 565 (1975). Without a hearing, Lopez and eight other high school students received ten-day suspensions for their misconduct at school. The United States Supreme Court ruled that fourteenth amendment due process rights prevent a student's suspension from public school without certain procedural safeguards. *Id.* at 577-84. A divided court (Burger, C.J., Powell, J., Blackmun, J., and Rehnquist, J., dissenting) ruled in favor of the students.

[5] 419 U.S. at 579. The Court stated that the notice and hearing requirement could be fulfilled simply by "informally discuss[ing] the alleged misconduct with the students minutes after it occurred." *Id.* at 582. *See generally* Mass, *Due Process Rights of Students: Limitations on* Goss v. Lopez*—A Retreat out of the Thicket*, 9 J.L. & EDUC. 449 (1980); Timar, *The Aftermath of Goss in the Federal Courts*, 9 NOLPE SCH. L.J. 123 (1981).

[6] *Goss*, 419 U.S. at 584.

[7] 435 U.S. 78 (1978). School officials dismissed Horowitz, a fourth-year medical school student, for failing to meet academic standards. The Supreme Court unanimously held that the procedures leading to Horowitz's dismissal did not violate her fourteenth amendment due process rights. *Id.* at 86. *But see id.* 92-96 (Powell, J., concurring), 96-97 (White, J., concurring in part and in judgment), 97-108 (Marshall, J., concurring and dissenting in part), 108-09 (Blackmun, J., and Brennan, J., concurring and dissenting in part).

[8] 435 U.S. at 86. *See generally* Brenner, *Charlotte's Web: Reflections on the Role of Due Process in Academic Decisionmaking*, 56 IND. L.J. 725 (1981); Buss, *Easy Cases Make Bad Law: Academic Expulsion and the Uncertain Law of Procedural Due Process*, 65 IOWA L. REV. (1979); Gee, *Constitutional Law--Procedural Due Process for Academic Dismissals*, 28 HOW. L.J. 713 (1985); Jennings, *Academic Dismissals: A Due Process Anomaly*, 58 NEB. L. REV. 519; Marx, *Horowitz: A Defense Point of View*, 13 J.L. & EDUC. 51 (1984); Singer, *Student Suspensions and Expulsions*, 17 AM. BUS. L.J. 526 (1980); Case Comment, *Fourteenth Amendment Due Process Does Not Require a Hearing Prior to the Dismissal of a Student for Academic Deficiencies*, 56 U. DET. J. URB. L. 225 (1978); Case Comment, *Academic Dismissals From State-Supported Universities: A Study in Policy*, 13 VAL. U.L. REV. 175 (1978); Case Comment, *Student Due Process Rights and Judicial Deference to Academic Dismissals*, 15 WILLAMETTE L. REV. 577 (1979).

[9] Although the Court unanimously agreed that Ms. Horowitz received adequate procedural protection, it split (5-4) on the academic/misconduct distinction. Justice White concurred separately to state his disagreement with this distinction. *Id.* at 96-97. Justice Marshall, dissenting and concurring in part, found the academic/misconduct distinction irrelevant: "In my view the effort to apply such labels does little to advance the due process inquiry. . . ." *Id.* at 97.

Many courts have failed to distinguish between what due process they require and what they approve. Moreover, decisions which have specified certain procedures are frequently limited to the particular facts of the case.[10] This wide range of decisions[11] obscures the threshold of acceptable procedure in student disciplinary hearings. Necessarily, these nebulous standards prompt two questions: (1) what factors raise substantive issues in a student disciplinary matter? and (2) precisely what process is due in a student disciplinary hearing?

## I. SUBSTANTIVE ISSUES IN STUDENT DISCIPLINARY MATTERS

College and university officials view student disciplinary matters as a fact of academic life. Yet, each disciplinary action may potentially end up in a court of law if a university official is perceived to have violated a student's rights.[12] In addition to procedural rights, university officials must consider substantive issues, including the classification of the student's conduct and the appropriate penalty for the student's disciplinary violation.

### A. *Classification of Student Conduct*

The rights of a student vary, depending upon whether a court classifies an action as disciplinary or academic.[13] Refusing to equate misconduct with academic failure, courts have historically distinguished disciplinary from academic matters.[14] In maintaining this distinction, *Horowitz* held that a hearing, although helpful in a disciplinary proceeding, is "useless or harmful" in an academic proceeding.[15]

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[10] "Just how much process is 'due' before a public educational institution may suspend a student is difficult precisely to define, apart from a specific factual setting." Gorman v. University of R.I., 646 F. Supp. 799 (D.R.I. 1986).

[11] *See generally* 15A AM. JUR. 2D *Colleges and Universities* §§ 23, 26-28 (1976 & Supp. 1986); 14 C.J.S. *Colleges and Universities* § 26 (1939 & Supp. 1986).

[12] "Only where erroneous and unwise actions in the field of education deprive students of federally protected rights or privileges does a federal court have power to intervene in the educational process." JUDICIAL STANDARDS OF PROCEDURE AND SUBSTANCE IN REVIEW OF STUDENT DISCIPLINE IN TAX-SUPPORTED INSTITUTIONS OF HIGHER EDUCATION, 45 F.R.D. 133, 136 (W.D. Mo. 1968) [hereinafter JUDICIAL STANDARDS].

[13] Dixon v. Alabama Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

[14] "Misconduct is a very different matter from failure to attain a standard of excellence in studies." *Horowitz*, 435 U.S. at 87 (quoting Barnard v. Inhabitants of Shelburne, 216 Mass. 19, 22, 102 N.E. 1095, 1097 (1913)). This rule has been uniformly accepted in state courts and, until the Eighth Circuit's decision in *Horowitz*, 538 F.2d 1317 (8th Cir. 1976), *rev'd*, 435 U.S. 78 (1978), "the Courts of Appeals were also unanimous in concluding that dismissals for academic (as opposed to disciplinary) cause do not necessitate a hearing before the school's decision-making body." 435 U.S. at 87.

[15] 435 U.S. at 89 (quoting *Barnard*, 102 N.E. at 1097). The Court reasoned that disciplinary proceedings closely resemble traditional judicial and administrative fact-finding situations. Consequently, a hearing in a disciplinary matter serves as a "hedge against error," while academic proceedings do not. *Id. See also* Mahavongsanan v. Hall, 529 F.2d 448, 449 (5th Cir. 1976) ("[T]he due process requirements of notice and hearing . . . have been carefully limited to disciplinary decisions.").

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Therefore, courts allow educational institutions to establish their own academic requirements and processes without judicial intervention. Courts generally agree that while a hearing best resolves disciplinary matters,[16] the subjectivity of academic judgment does not adapt well to procedural due process. Because courts find that faculty members are in the best position to academically evaluate students[17] they generally respect the faculty's judgment when reviewing academic decisions.[18]

Since academic dismissals require minimal procedural protection, procedural due process violations are rare. Court reversals of academic dismissals usually result from a substantive due process violation. Such a violation would include a decision based on unconstitutional criteria or a decision which was "arbitrary and capricious." The United States Supreme Court, in *Regents of University of Michigan v. Ewing*,[19] set a rigid standard to determine arbitrary and capricious behavior. The Court ruled that if the school's decision was not made in bad faith and the procedures applied were not unfair, the decision will stand unless it "is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."[20]

This judicial deference to academicians in academic matters provides a testing ground for university officials as well as students. Courts are aware that university officials may characterize an issue as academic, while a student may want to couch the same matter in disciplinary terms.[21] University officials violate due process protections if they erroneously classify a matter as academic and do not afford the student a hearing.[22] Differentiating between misconduct and a failure to meet scholastic standards "depends upon a collection of the facts concerning the charged misconduct."[23] Courts may have difficulty drawing this distinction, as evidenced by the Supreme Court's 5-4 split in *Horowitz*.[24]

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[16] "A decision relating to the misconduct of a student requires a factual determination as to whether the conduct took place or not. The accuracy of that determination can be safeguarded by the sorts of procedural protections traditionally imposed under the Due Process Clause." *Horowitz*, 435 U.S. at 95 n.5 (Powell, J., concurring). *But cf.* Ross v. Pennsylvania State Univ., 445 F. Supp. 147, 156 (M.D. Pa. 1978) ("The failure to afford Ross a hearing at which he could explain any mitigating circumstances for his poor scholarship before terminating him as a graduate student violated his right to due process.").

[17] See Navato v. Sletten, 560 F.2d 340, 345 (8th Cir. 1977) ("School officials have a strong interest in freedom from outside intervention in matters of academic evaluation."); Greenhill v. Bailey, 519 F.2d 5, 9 (8th Cir. 1975) ("A graduate or professional school is, after all, the best judge of its students' academic performance and their ability to master the required curriculum."); Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1250 (E.D. Mich. 1984) ("While a university cannot ignore its duty to treat its students fairly, neither is it required to transform its classrooms into courtrooms.") (citing Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992, 1000 (5th Cir. 1975)), *aff'd per curiam*, 787 F.2d 590 (6th Cir. 1986).

[18] See Regents of Univ. of Mich. v. Ewing, 106 S. Ct. 507, 513 (1985) ("When judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment."); *Horowitz*, 435 U.S. at 90 (enlarging judicial presence in the academic community would "risk the deterioration of many beneficial aspects of the faculty-student relationship.") *See generally* Milam and Marshall, *Impact of* Regents of the University of Michigan v. Ewing *on Academic Dismissals from Graduate and Professional Schools*, 13 J.C. & U.L. 335 (1987).

[19] 106 S. Ct. 507 (1985).

[20] *Id.* at 1573. *See also Horowitz*, 435 U.S. at 88-89 ("Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to . . . judicial and administrative fact-finding proceedings.").

Although some courts discuss the importance of the academic/misconduct distinction, little guidance exists to determine proper classification of a student action. One court found a disciplinary matter when scholastic standards are not involved and the parties dispute "facts concerning whether [the student] did or did not comply with certain school regulations."[25] Because cheating involves both prongs of this test, courts have addressed due process issues stemming from cheating in both the academic[26] and the disciplinary[27] context. In ruling

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[21] *See, e.g.*, Keys v. Sawyer, 353 F. Supp. 936, 939 (S.D. Tex. 1973) (quoting Egner v. Texas City Indep. School Dist., 338 F. Supp. 931, 937 (S.D. Tex. 1972)); *see also* Jansen v. Emory Univ., 440 F. Supp. 1060, 1063 (N.D. Ga. 1977) (If the decision to dismiss the student was "essentially academic and neither alleged nor shown to be a mere pretense to punish him for disciplinary infractions," it is not subject to judicial review.), *aff'd*, 579 F.2d 45 (5th Cir. 1978).

[22] *See, e.g.*, Woody v. Burns, 188 So. 2d 56 (Fla. Dist. Ct. App. 1966). Noting that it would not have interfered had the student been dismissed for academic reasons, the court reinstated the student because he had, in fact, been dismissed for misconduct. *Id.* at 59.

[23] Dixon v. Alabama Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961). The 1960s brought many successful student due process challenges to institutional penalties. *See, e.g.*, Soglin v. Kauffman, 418 F.2d 163, 168 (7th Cir. 1969) ("[E]xpulsion and prolonged suspension may not be imposed on students by a university simply on the basis of allegations of 'misconduct' without reference to any preexisting rule which supplies an adequate guide.").

However, the pre-1960s courts favored the in loco parentis doctrine and gave great deference to the college or university. *See, e.g.*, People *ex rel.* O'Sullivan v. New York Law School, 68 N.Y. Sup. Ct. 118, 22 N.Y.S. 663 (1893) (court upheld dismissal of law student on grounds that he argued with the dean the day before graduation); John B. Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924) (court ruled university had no duty to make and prove charges against student expelled for "ringing cow bells"); Anthony v. Syracuse Univ., 224 A.D. 487, 231 N.Y.S. 435, 437 (1928) (court upheld dismissal of fourth-year student because she "caused a lot of trouble" at her sorority and did not act like "a typical Syracuse girl").

[24] *See* Buss, *supra* note 8, at 8-9. Noting that the student's deficiencies included her poor relationship with others, tardiness, nonparticipation in school activities, failure to take criticism maturely, and poor personal hygiene, Professor Buss argues that the United States Supreme Court created a weak distinction between academic and behavioral standards.

[25] Brookins v. Bonnell, 362 F. Supp. 379, 383 (E.D. Pa. 1973).

[26] *See* Corso v. Creighton Univ., 731 F.2d 529, 532 (8th Cir. 1984). The court ruled that "cheating on exams is clearly an academic matter." The student's lying about the cheating was interrelated, and the court held that it was reasonable to classify the matter as an academic offense. *See also* Garshman v. Pennsylvania State Univ., 395 F. Supp. 912, 921 (M.D. Pa. 1975) ("[A] determination as to the academic dishonesty of a student

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cheating a disciplinary matter, the court in *Jaksa v. Regents of University of Michigan*[28] acknowledged that cheating is "an offense which cannot be neatly characterized as either 'academic' or 'disciplinary.' "[29]

The *Horowitz* and *Ewing* decisions demonstrate that the classification of a student's behavior as academic or disciplinary has substantial due process implications. Consequently, school officials should carefully consider all of the circumstances surrounding an incident before classifying the matter as academic or disciplinary. If the academic dishonesty matter includes factual disputes, university officials should grant the student the same procedural safeguards as those in a disciplinary matter. Moreover, established criteria, such as those found in a student handbook, code of conduct, or honor code, may help to classify a cheating violation. Such a document may set out the procedural guidelines with which to address the alleged infraction. Typically, such procedures grant more due process than is constitutionally required.

### B. *Penalties for Disciplinary Violations*

Clearly, colleges and universities have authority to regulate both the academic and nonacademic behavior of students.[30] This power is justified in the frequently quoted judicial statement:

> In the field of discipline, scholastic and behavioral, an institution may establish any standards reasonably relevant to the lawful missions, processes, and functions of the institution. It is not . . . lawful . . . to prohibit the exercise of a right guaranteed

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. . . is a matter purely within the discretion of a college administrator."); McDonald v. Board of Trustees of Univ. of Ill., 375 F. Supp. 95, 104 (N.D. Ill. 1974) (Three medical school students, expelled for cheating, were denied relief because they were not "disciplined for conduct arguably falling within thescope of any constitutional protection."), *aff'd*, 503 F.2d 105 (7th Cir. 1974). *See generally* Roberts, *Public University Responses to Academic Dishonesty: Disciplinary or Academic*, 15 J.L. & EDUC. 369 (1986).

[27] See Jaksa v. Regents of Univ. of Michigan, 597 F. Supp. 1245, 1248 n.2 (E.D. Mich. 1984) (student accused of cheating on final examination), *aff'd per curiam*, 787 F.2d 590 (6th Cir. 1986); *see also* Hall v. Medical College of Ohio, 742 F.2d 299 (6th Cir. 1984) (disciplinary hearing for academic dishonesty), *cert. denied*, 469 U.S. 1113 (1985).

[28] 597 F. Supp. 1245 (E.D. Mich. 1984), *aff'd per curiam*, 787 F.2d 590 (6th Cir. 1986).

[29] *Id.* at 1248 n.2. The *Jaksa* court relied on the Supreme Court's reasoning that academic dismissals are "more subjective and evaluative than the typical factual questions presented in the average disciplinary decision." *Horowitz*, 435 U.S. at 90.

[30] In Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969), the leading case establishing the necessity of pre-existing written standards of student conduct, the court stated: "No one disputes the power of the University to protect itself by means of disciplinary action against disruptive students. Power to punish and the rules defining the exercise of that power are not, however, identical." *Id.* at 167.

> by the Constitution or a law of the United States to a member of the academic community . . . .[31]

When a student violates an established institutional standard,[32] either on or off campus grounds,[33] a university may impose an appropriate penalty. These penalties include reprimand, fine, removal from extracurricular activities, disciplinary probation, alteration of student status, suspension, or expulsion. A court's willingness to entertain a student's challenge to a disciplinary procedure rests on the identification of a protected interest. Usually, courts find that a liberty[34] or property[35]

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[31] *See* JUDICIAL STANDARDS, *supra* note 12, at 145.

[32] *See id.*, which advocates:

> [Institutional] [s]tandards so established may apply to student behavior on and off the campus when relevant to any lawful mission, process, or function of the institution. By such standards of student conduct the institution may prohibit any action or omission which impairs, interferes with, or obstructs the mission, processes, and functions of the institution.

[33] Courts have consistently upheld an institution's authority to discipline students for off-campus misconduct. *See, e.g.*, Wimmer v. Lehman, 705 F.2d 1402, 1407 (4th Cir. 1983) (Naval Academy may dismiss midshipman for possession of marijuana); Hart v. Ferris State College, 557 F. Supp. 1379, 1380 (W.D. Mich. 1983) (college may hold disciplinary hearing for student arrested for selling drugs); Sohmer v. Kinnard, 535 F. Supp. 50, 51 (D. Md. 1983) (pharmacy school may dismiss student for cocaine possession); Krasnow v. Virginia Polytechnic Inst. & State Univ., 414 F. Supp. 55, 57 (W.D. Va. 1976) (university may discipline students for unlawful use or possession of drugs), *aff'd*, 551 F.2d 591 (4th Cir. 1977); Paine v. Board of Regents, 355 F. Supp. 199, 203 (W.D. Tex. 1972) (court upheld rule requiring automatic two-year suspension for any student placed on probation or convicted of illegal use, possession, or sale of drugs), *aff'd*, 474 F.2d 1397 (5th Cir. 1973); Esteban v. Central Mo. State College, 277 F. Supp. 649, 651 (W.D. Mo. 1967 ) (due process required for campus prosecution of student for participation in off campus street demonstration), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970); Wallace v. Florida A. & M. Univ., 433 So. 2d 600 (Fla. 1983) (university may dismiss pharmacy student following his conviction for intent to distribute cocaine); Kusnir v. Leach, 64 Pa. Commw. 65, 439 A.2d 223, 226 (1982) (college "may regard off-campus behavior as a reflection of a student's character and his fitness to be a member of the student body.").

*See generally* Annotation, *Misconduct of College or University Student Off Campus as Grounds for Expulsion, Suspension, or Other Disciplinary Action*, 28 A.L.R. 4TH 463 (1984); *See also* Annotation, *Participation of Student in Demonstration on or near Campus as Warranting Expulsion from School or College*, 32 A.L.R. 3D 864 (1970).

[34] Suspension from an educational institution involves a sufficient "liberty interest" to entitle a student to fourteenth amendment guarantees. *See Goss*, 419 U.S. at 575 (liberty interests were implied for high school students since their ten-day suspension "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."); Board of Regents v. Roth, 408 U.S. 564, 573 (1972) (A liberty interest develops when an institution imposes "a stigma or other disability that foreclose[s] [the] freedom to take advantage of other . . . opportunities."); Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) (Liberty interests include circumstances "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him.").

[35] A public school student may have a "property interest" in continuing his or her education at the institution in question. *See* Ewing v. Board of Regents of Univ. of

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interest in the disciplinary sanction entitles a student to constitutional processes.

Courts have generally not required a college or university to adopt a less intrusive alternate punishment.[36] However, in *Gorman v. University of Rhode Island*,[37] the court ruled that the university could not, as a disciplinary sanction, require the student to seek counseling.[38] For a court to overturn a student's expulsion on substantive grounds, it must find the dismissal arbitrary or capricious.[39] University officials can avoid claims of arbitrary and capricious action if disciplinary penalties are within "reasonable and constitutional parameters."[40] Moreover, procedural protections that comport with due process requirements safeguard universities from acting arbitrarily and capriciously.

## II. What Process Is Due

Following the rulings of *Dixon v. Alabama Board of Education*[41] and *Goss v. Lopez*,[42] lower courts agree that due process in student disciplinary matters minimally requires adequate notice, an opportunity for a hearing, and substantial evidence to support the penalty. Additional procedural protections, including preservation of the student's pre-hearing status, the right to proceed before an impartial hearing

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Mich., 742 F.2d 913, 915 (6th Cir. 1984), *rev'd on other grounds*, 106 S. Ct. 507 (1985) ("[A]n implied understanding that a student shall not be arbitrarily dismissed from his university is a property interest."); *Goss*, 419 U.S. at 574 "[T]he State is constrained to recognize a student's legitimate entitlement to a public education as a property interest."); Stoller v. College of Medicine, 562 F. Supp. 403, 412 (M.D. Pa. 1983) (graduate student has a "property" interest in continuing a course of study), *aff'd per curiam*, 727 F.2d 1101 (3d Cir. 1984); Hall v. University of Minn., 530 F. Supp. 104, 107 (D. Minn. 1982) ("A student's interest in attending a university is a property right protected by due process.").

[36] See Bistrick v. University of S.C., 324 F. Supp. 942, 952 (D.S.C. 1971) (cited with approval in Herman v. University of S.C., 341 F. Supp. 226, 231 (D.S.C. 1971)).

[37] 646 F. Supp. 799 (D.R.I. 1986).

[38] "[T]he sanction of compulsory psychiatric treatment is a 'shocking extreme.' " Id. at 814.

[39] See *Dixon*, 294 F.2d at 157 (The power to expel students "is not unlimited and cannot be arbitrarily exercised."); Keys v. Sawyer, 353 F. Supp. 936, 940 (S.D. Tex. 1973); Connelly v. University of Vt., 244 F. Supp. 156, 159 (D. Vt. 1965). *But see* Board of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 92 (1978) (Court did not decide if courts have power to review academic decisions based on an "arbitrary or capricious" standard.).

[40] Nash v. Auburn Univ., 812 F.2d 655 (11th Cir. 1987) (quoting *Dixon*, 294 F.2d at 157).

[41] 294 F.2d 150 (1961), *cert. denied*, 368 U.S. 930 (1961). If school officials follow rudimentary elements of fair play, "the requirements of due process of law will have been fulfilled." *Id.* at 159.

[42] 419 U.S. 565 (1975). "[R]equiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action." *Id.* at 583.

board, the right to counsel, the right to confront witnesses, the right to invoke the privilege against self-incrimination, and the right to obtain a record of the proceedings are left to the court's discretion.[43] Although a court cannot order a university to adopt procedures beyond those required by the Constitution, due process requires that a university consistently apply those elements of the established procedure it promulgates.[44] However, a university does not necessarily violate the Constitution by breaching its procedural rules; courts may view this action as a type of harmless error.[45]

The United States Supreme Court in *Mathews v. Eldridge*[46] established a three-step analysis to determine what process is due. In *Mathews*, the Court balanced: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of that interest; and (3) the public interest, weighed against the fiscal and administrative burden of any additional procedural requirements.[47] Many courts have applied this analysis to student disciplinary matters.[48] Its framework can guide college and university officials in developing or refining procedural aspects of student disciplinary matters.

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[43] *See also* Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1250 (E.D. Mich. 1984) ("[A] school disciplinary proceeding is not a criminal trial, nor is a student accused of cheating entitled to all the procedural safeguards afforded criminal defendants.") (citing Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992, 1000 (5th Cir. 1975)), *aff'd per curiam*, 787 F.2d 590 (6th Cir. 1986); Betts v. Board of Educ., 466 F.2d 629, 633 (7th Cir. 1982); Norton v. Discipline Comm. of East. Tenn. State Univ., 415 F.2d 195, 200 (6th Cir. 1969) ("We do not believe that there is a good analogy between student discipline and criminal procedure."); Esteban v. Central Mo. State College, 415 F.2d 1077, 1090 (8th Cir. 1969) ("[S]chool regulations are not to be measured by the standards which prevail for the criminal law and for criminal procedure."), *cert. denied*, 398 U.S. 965 (1970); University of Houston v. Sabeti, 676 S.W.2d 685, 689 (Tex. Ct. App. 1984) ("The due process clause requires only fundamental fairness; it does not require that every dispute with a government agency be resolved as a lawsuit would be.").

[44] *See* Picozzi v. Sandalow, 623 F. Supp. 1571, 1579 (E.D. Mich. 1986); Ross v. Pennsylvania State Univ., 445 F. Supp. 147, 152 (M.D. Pa. 1978); Hillman v. Elliot, 436 F. Supp 812, 817 (W.D. Va. 1977); Everett v. Marcase, 426 F. Supp. 397, 401 (E.D. Pa. 1977).

[45] *Horowitz*, 435 U.S. at 92 n.8.

[46] 424 U.S. 319, 334-35 (1976). *Mathews* involved Social Security procedures for terminating a person's disability.

[47] 424 U.S. 319, 334-35 (1976). *See generally* Golden, *College Student Dismissals and the Eldridge Factors: What Process Is Due?* 8 J.C. & U.L. 497 (1981); Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

[48] Many courts have cited the "Mathews" factors in their discussion of student due process rights in disciplinary matters. *See Horowitz*, 435 U.S. at 99; Nash v. Auburn Univ., 812 F.2d 655, 660 (11th Cir. 1987); Gabrilowitz v. Newman, 582 F.2d 100, 105 (1st Cir. 1978); Gorman v. University of R.I., 646 F. Supp. 799, 808 (D.R.I. 1986); *Picozzi*, 623 F. Supp. at 1577-79; Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1248 (E.D. Mich. 1984), *aff'd per curiam*, 787 F.2d 590 (6th Cir. 1986); Hart v. Ferris State College, 557 F. Supp. 1379, 1387 (W.D. Mich. 1983); Bleicker v. Board of Trustees of Ohio State Univ., 485 F. Supp. 1381, 1387-88 (S.D. Ohio 1980); *Ross*, 445 F. Supp. at 153.

At times, a student receiving a severe penalty (usually suspension or dismissal) sues for an injunction seeking reinstatement or other relief. In those cases, a court reviews the student's pleadings and determines whether: (1) the student will suffer irreparable injury if it does not grant an injunction; (2) an injunction will substantially harm others; (3) the student is likely to succeed on the merits; and (4) the injunction would serve the public interest.[49] If the student meets these criteria and demonstrates a due process violation, the court can issue an injunction and order a de novo hearing.[50] However, if it finds no due process violations, the court should not issue an injunction and will uphold the college's decision.[51] As one court wrote: "[T]he only penalty, detriment, or requirement upon the university is that it go back and start over. If the proscribed conduct is properly established, a plaintiff in a case such as this wins no prizes as a result of the initial university misstep. . . ."[52]

### A. *Student Status Prior to Disciplinary Hearing*

Administrative decisions regarding a student's status prior to a disciplinary hearing can invoke important concerns for university officials as well as the student. A student's alleged misconduct may create a genuine threat to campus safety. The unique aspect of the campus environment—where the violators, victims, and potential witnesses may live and attend classes together—necessitates a change in a student's status before a hearing. Given the short length of an academic term and the importance of attending classes, altering a student's pre-hearing status through suspension or dismissal may adversely affect the student.[53] On the other hand, the need for swift administrative action prior to a disciplinary hearing may outweigh the student's due process rights.[54] In a recent decision, *Picozzi v. Sandalow*,[55] the court concluded that persons in administrative positions "must have . . . the authority to take prompt and reasonable preliminary action that preserves the university's interest without finally and permanently depriving a student of his interest in continuing his education."[56] If valid interests are at stake, courts generally uphold a change in student status prior to a hearing.[57]

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[49] *See* Women's Community Health Center v. Cohen, 477 F. Supp. 542, 544 (D. Me. 1979) (quoted in McLaughlin v. Massachusetts Maritime Acad., 564 F. Supp. 809, 811 (D. Mass. 1983)); *see also* Mason County Medical Ass'n v. Knebel, 563 F.2d 256, 261 (6th Cir. 1977) (cited in Bleicker v. Board of Trustees of Ohio State Univ., 485 F. Supp. 1381, 1386 (S.D. Ohio 1980)).

[50] See, e.g., Corso v. Creighton Univ., 731 F.2d 529, 533 (8th Cir. 1984); *Gorman*, 646 F. Supp. at 815; Brookins v. Bonnell, 362 F. Supp. 379, 384 (E.D. Pa. 1973).

[51] See, e.g., Mahavongsanan v. Hall, 529 F.2d 448, 450 (5th Cir. 1976); *Picozzi*, 623 F. Supp. at 1571; *Hart*, 557 F. Supp. at 1391.

[52] Gardenhire v. Chalmers, 326 F. Supp. 1200, 1206 (D. Kan. 1971). *See also* *Gorman*, 646 F. Supp. at 804 (court vacated sanctions against the student and ordered a de novo disciplinary hearing that satisfied due process requirements); Bistrick v. University of S.C., 324 F. Supp. 942, 952 (D.S.C. 1971) (de novo hearing cures earlier procedural deficiencies) (citing with approval Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747, 868 (W.D. La. 1968).

[53] *See* American Association of University Professors, *Joint Statement on Rights and Freedoms of Students*, 53 AAUP BULL. 365 (1967), which recommends:

> Pending action on the charges, the status of the student should not be altered, or his right to be present on the campus and to attend classes suspended, except for reasons relating to his physical or emotional safety and well-being, or for reasons relating to the safety and well-being of students, faculty, or university property.

### B. *Notice and Hearing*

Since *Dixon v. Alabama Board of Education*,[58] courts have consistently held that due process requires that student disciplinary hearings include notice and the opportunity for a hearing.[59] While the notice must be timely and inform the student of the proposed action and its grounds, courts have not prescribed minimal pro forma requirements for proper notice.[60] Clearly, courts will not hold the university

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[54] The Court noted in *Goss* that a student who poses a threat to safety or creates continual disruptions may be removed immediately before notice and hearing. 419 U.S. at 582-83. The court in Picozzi v. Sandalow, 623 F. Supp. 1571, 1578 (E.D. Mich. 1986), relied on *Goss* in ruling that a law student was not entitled to a pre-suspension hearing. The dean conditioned the student's re-enrollment on successful completion of a polygraph test regarding a dormitory fire (in which the student was the chief suspect), or alternatively, an administrative hearing at the student's convenience. *Id. See also* Arnett v. Kennedy, 416 U.S. 134, 164 (1974); Winnick v. Manning, 460 F.2d 545, 547 (2d Cir. 1972); Stricklin v. Regents of Univ. of Wis., 297 F. Supp. 416, 420 (W.D. Wis. 1969).

[55] 623 F. Supp. 1571, 1579 (E.D. Mich. 1986). In ruling that the weight of the student's interest (unqualified certification of good standing) was less than that in *Goss*, the court held that less procedural protection is due. Furthermore, the dean's action was supported in protecting the law school community and in not misleading other law schools.

[56] *Id.*

[57] *See* Scheuer v. Rhodes, 416 U.S. 232, 246 (1974) ("[O]fficials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office."); *see also* Buck v. Carter, 308 F. Supp. 1246, 1249 (W.D. Wis. 1970); Barker v. Hardway, 283 F. Supp. 228, 235 (S.D. W.Va. 1968), *aff'd*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969); Jones v. Tennessee State Bd. of Educ., 279 F. Supp. 190, 202 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969).

[58] 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

[59] *Id.* at 156-57 ("The notice should contain a statement of the specific charges and grounds. . . .")

[60] *See* Nash v. Auburn Univ., 812 F.2d 655, 661 (11th Cir. 1987) ("There are no hard and fast rules by which to measure meaningful notice."); Esteban v. Central Mo. State College, 277 F. Supp. 649, 651 (W.D. Mo. 1967) (The precise nature of the notice will vary "depending upon the circumstances of the particular case."), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970); Greenhill v. Bailey, 519 F.2d 5, 9 (8th Cir. 1975) (lack of notice denied student due process); *Dixon*, 294 F.2d 150, 158 (notice should contain a statement of the specific charges and grounds); Herman v. University of S.C., 341 F. Supp. 226, 230 (D.S.C. 1971) ("[T]he student must be advised, in advance of the hearing, [of] the grounds of the charges against him."), *aff'd per curiam*, 457 F.2d 902 (4th Cir. 1972). *See also* 4 AM. JUR. LEGAL FORMS 2D *Colleges and Universities* § 60:125 (1971) (suspension or expulsion of students for misconduct).

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to strict criminal law standards regarding notice,[61] including pre-hearing notice of the evidence.[62] Although some situations permit oral notice,[63] written notice containing a specific description of the charges and the time, date, and place of the hearing will best serve the educational institution and the student. Proper notice may benefit the institution if a student challenges its action. In identifying notice as a key element of due process, Judge Friendly suggested that "the more forthcoming the agency has been in disclosing its grounds, the stronger should be its position in asking curtailment of other procedures."[64]

Students also have a due process right to a hearing in a disciplinary matter.[65] The degree of formality afforded the student in the disciplinary hearing varies.[66] A closed hearing does not violate a student's due process rights.[67] Due process does not require that the ultimate decision-making authority actually hear the student.[68] Furthermore, changing a hearing before a disciplinary committee to one before a special committee established by university officials does not deny a student due process.[69] Without question, university officials must provide students with adequate notice and a hearing. While the degree of necessary formality differs, these components of due process need not rise to the level required in criminal proceedings.

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[61] Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992, 1000 (5th Cir. 1975).

[62] *Nash*, 621 F. Supp. at 954-55.

[63] *See Goss*, 419 U.S. at 581.

[64] Friendly, *Some Kind of Learning*, 123 U. PA. L. REV. 1267, 1281 (1975). *See also Nash*, 621 F. Supp. at 953-54.

[65] "[A] hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved." *Dixon*, 294 F.2d at 159. *See* Herman v. University of S.C., 341 F. Supp. 226, 230 (D.S.C. 1971) (student has a right to be heard in his own defense and to be present and present evidence), *aff'd*, 457 F.2d 902 (4th Cir. 1972); Esteban v. Central Mo. State College, 277 F. Supp. 649, 651 (W.D. Mo. 1967) ("[T]he disciplinary authority [should] provide[] a fair opportunity for hearing the student's position, explanation, and evidence."), *aff'd*, 415 F.2d 1077. For historical treatment of this issue, see Annotation, *Right of a Student to Hearing on Charges Before Suspension or Expulsion from Educational Institution*, 58 A.L.R. 2D 903 (1958).

[66] While requiring the rudiments of an adversarial proceeding, *Dixon* also recognized the need to preserve the institution's interest: "[A] full-dress judicial hearing . . . might be detrimental to the college's educational atmosphere and impractical to carry out." 294 F.2d 150, 159. *See* Fain v. Brooklyn College of City Univ. of N.Y., 112 A.D.2d 992, 493 N.Y.S.2d 13, 14 (1985) ("Despite the informality of the hearing . . . petitioners were afforded a full opportunity to explain their actions and confront their accusers.").

[67] Hart v. Ferris State College, 557 F. Supp. 1379, 1389 (W.D. Mich. 1983). In denying the student's claim to a right for a public hearing, the court stated: "It is difficult to understand how the presence of such other students would decrease the risk of an erroneous expulsion but it is easy to see how their presence could be disruptive to the proceedings." *See also* Morale v. Grigel, 422 F. Supp. 988, 1004 (D.N.H. 1976) ("[O]pen hearings would avoid . . . the appearance of arbitrary decision-making violative of the Fourteenth Amendment."); Moore v. Troy State Univ., 284 F. Supp. 725, 731 (M.D. Ala. 1968).

[68] Sohmer v. Kinnard, 535 F. Supp. 50, 54 (D. Md. 1982) ("Student's right to be heard does not necessarily extend to an appearance before the ultimate authority in the disciplinary process.") (citing *Herman*, 341 F. Supp. at 230). In *Sohmer*, the court denied the student's contention that he was entitled to a full hearing before the Faculty Assembly, instead of the Student Grievance and Disciplinary Committee. 535 F. Supp. at 54.

[69] *Herman*, 341 F. Supp. at 232.

### C. *Hearing Board*

The hearing board in student disciplinary matters frequently acts as both judge and jury. Members of the college community, including students, usually comprise the hearing board. Given the nature of the academic community, members of the hearing board may know the student outside the context of the disciplinary proceeding. Although the neutral and detached fact-finder of the criminal justice system is not necessary,[70] due process requires that hearing boards exercise independent judgment, so that they do more than ratify an administrator's evidentiary conclusions and disciplinary sanctions.[71]

Each student disciplinary case initially presumes the impartiality of university officials.[72] The hearing adjudicator's prior familiarity with the incident does not necessarily violate due process.[73] University officials violate due process only when the level of prior involvement creates a probability that the decision maker would decide the issue with partiality.[74] A student challenging the hearing board's action on grounds of bias or undue influence bears the burden of proving that the board acted improperly.[75] For a court to sustain this claim, the student cannot base the alleged prejudice on speculation or inference, but must support it with evidence from the record.[76] Because of this difficult burden, student challenges to hearing boards generally fail. Nonetheless, university officials should scrutinize the composition of a hearing board in each disciplinary matter. While a board member has no constitutional obligation of recusation, fundamental fairness may suggest this action as in the best interest of both parties.

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[70] *See* Blanton v. State Univ. of N.Y., 489 F.2d 377, 386 (2d Cir. 1973) (due process was not violated when a dean who had witnessed the incident at issue also sat on the hearing committee); Jones v. Tennessee State Bd. of Educ., 279 F. Supp. 190, 200 (M.D. Tenn. 1968) (in the absence of proof of malice or personal interest, a member of the hearing committee may give evidence against the accused student), *aff'd*, 407 F.2d 834 (6th Cir. 1969).

[71] See Lee v. Macon County Bd. of Educ., 490 F.2d 458, 461 (5th Cir. 1974) ("Formalistic acceptance or ratification of the principal's request or recommendation as to the scope of punishment, without independent Board consideration of what . . . the penalty should be, is less than full due process.").

[72] *See* Megill v. Board of Regents of State of Fla., 541 F.2d 1073, 1079 (5th Cir. 1976) ("An impartial decisionmaker is a basic constituent of minimum due process."); Winnick v. Manning, 460 F.2d 545, 548 (2d Cir. 1972) ("[A] fundamental requirement is that a hearing must be accorded before an impartial decision maker."); Wasson v. Trowbridge, 382 F.2d 807, 813 (2d Cir. 1967) ("[A] fair hearing presupposes an impartial trier of fact.").

[73] *See* Nash v. Auburn Univ., 812 F.2d 655, 666 (11th Cir. 1987); *Megill*, 541 F.2d at 1079 (due process does not require per se disqualification of administrative hearing body); Duke v. North Tex. State Univ., 469 F.2d 829, 834 (5th Cir. 1972) (members of a hearing panel not disqualified solely because they were college employees or had participated in the investigation leading to the hearing), *cert. denied*, 412 U.S. 932 (1973); *Winnick*, 460 F.2d at 549 ("[T]he mere fact that the decision maker in a disciplinary hearing is also an administrat[or]" does not violate due process.); Hillman v. Elliot, 436 F. Supp. 812, 816 (W.D. Va. 1977) ("To be denied due process, plaintiff must show prejudice by the principal stemming from a source other than knowledge of the case."). *Contra Wasson* 382 F.2d at 813 ("[P]rior official involvement in a case renders impartiality most difficult to maintain."); *But cf.* Gonzales v. McUen, 435 F. Supp. 460, 464 (C.D. Cal. 1977) (due process violated because superintendent's presence at a school board deliberation "might operate as an inhibiting restraint.").

### D. *Right to Legal Counsel*

In *Goss v. Lopez*, the United States Supreme Court stated that in more difficult disciplinary cases a university should afford a student "more formal procedures."[77] This dictum has created much confusion in the federal courts, resulting in a split on the issue of a student's right to legal representation at disciplinary hearings.[78] Generally, most courts do not find due process violations where university officials permit students to be represented by legal counsel,[79] but several courts have rejected the assertion that due process entitles a student to legal counsel at a disciplinary hearing.[80]

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[74] In Gorman v. University of R.I., 646 F. Supp. 799, 811-13 (D.R.I. 1986), the court ruled the hearing board to be insufficiently free of bias to satisfy due process requirements. The court found this bias because some voting members of the hearing panel had served on prior boards which unanimously found the same student guilty of disciplinary offenses. *See also* Cloud v. Trustees of Boston Univ., 720 F.2d 721, 725 (1st Cir. 1983) ("[I]n some cases, a Hearing Examiner may be so biased as to destroy the fairness of the hearing.").

[75] See Barker v. Hardway, 283 F. Supp. 228, 237 (S.D. W.Va. 1968) ("[T]he law indulges the presumption that school authorities act reasonably and fairly and in good faith in exercising the authority with which it clothes them, and casts the burden on him who calls their conduct into question to show that they have not been activated by proper motives."), *aff'd*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969).

[76] *See* Levitt v. University of Tex., 759 F.2d 1224, 1228 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 599 (1985); Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992, 1003 (5th Cir. 1975); *Duke*, 469 F.2d at 829.

[77] 419 U.S. at 584. Justice White, however, emphasized that *Goss* only involved short suspensions. The Court refused to outline due process requirements for longer suspensions and expulsions. The Court explained: "We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspension must afford the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident." *Id.* at 583-84.

[78] *Cf.* Annotation, *Right to Assistance by Counsel in Administrative Proceedings*, 33 A.L.R.3D 229, 286-89 (1970).

[79] See, e.g., Wimmer v. Lehman, 705 F.2d 1402, 1406 (4th Cir. 1983), *cert. denied*, 464 U.S. 992 (1983); Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992, 995 (5th Cir. 1975); Nash v. Auburn Univ., 621 F. Supp. 948, 958 (M.D. Ala. 1985), *aff'd*, 812 F.2d 655 (11th Cir. 1987); Cody v. Scott, 565 F. Supp. 1031, 1035 (S.D.N.Y. 1983); Turof v. Kibbee, 527 F. Supp. 880, 886 (E.D.N.Y. 1981); Adibi-Sadeh v. Bee County College, 454 F. Supp. 552, 556 (S.D. Tex. 1978); Morale v. Grigel, 422 F. Supp. 988,

Courts which recognize the right to counsel in disciplinary proceedings justify this position in several ways: (1) suspension or dismissal is a serious deprivation which mandates additional procedural safeguards;[81] (2) legal counsel can help protect the student's interest at the proceeding;[82] (3) permitting the student to have counsel minimally burdens the university;[83] (4) a student needs counsel to balance the university's use of an attorney;[84] (5) the hearing will employ complex rules of evidence or procedure;[85] (6) the disciplinary matter involves criminal activity;[86] and (7) the student has a statutory right to counsel under the particular state's law.[87]

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1003 (D.N.H. 1976); Birdwell v. Schlesinger, 403 F. Supp. 710, 715-16 (D. Colo. 1975); Marin v. University of P.R., 377 F. Supp. 613, 618 (D.P.R. 1974); Center for Participant Educ. v. Marshall, 337 F. Supp. 126, 136 (N.D. Fla. 1972); Bistrick v. University of S.C., 324 F. Supp. 942, 952 (D.S.C. 1971); Speake v. Grantham, 317 F. Supp. 1253, 1259 (S.D. Miss. 1970), *aff'd per curiam*, 440 F.2d 1351 (5th Cir. 1971); Keene v. Rodgers, 316 F. Supp. 217, 221 (D. Me. 1970).

[80] *See* Greenhill v. Bailey, 519 F.2d 5, 9 (8th Cir. 1975) (The presence of attorneys "would serve no useful purpose. . . ."); Madera v. Board of Educ., 386 F.2d 778, 786 (2d Cir. 1967) (no right to counsel at a conference relating to the suspension of a student), *cert. denied*, 390 U.S. 1028 (1968); Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967) (Merchant Marine cadet had no right to counsel at disciplinary and expulsion hearings); Gorman v. University of R.I., 646 F. Supp. 799, 806 (D.R.I. 1986) (no right to legal counsel); Jaksa v. Regents of Univ. of Mich. 597 F. Supp. 1245, 1252 (E.D. Mich. 1984) (no right to counsel at suspension hearing), *aff'd per curiam*, 787 F.2d 590 (6th Cir. 1986); Kolesa v. Lehman, 534 F. Supp. 590, 594 (N.D.N.Y. 1982) (due process does not require counsel at hearing); Garshman v. Pennsylvania State Univ., 395 F. Supp. 912, 921 (M.D. Pa. 1975) (where elaborate procedures ensure fair results, courts should not "force the inclusion of a non-University individual into this delicate decision-making matter"); Haynes v. Dallas County Junior College Dist., 386 F. Supp. 208, 212 (N.D. Tex. 1974) (due process does not include a right to counsel in disciplinary hearings); Barker v. Hardway, 283 F. Supp. 288, 238 (S.D. W. Va. 1966) (right to counsel does not apply to proceedings that are "investigative" and not "adjudicative"), *aff'd* per curiam, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969); Due v. Florida A. & M. Univ., 233 F. Supp. 396, 403 (N.D. Fla. 1963) (due process does not require a university disciplinary committee to conduct a "full scale judicial trial" with qualified attorneys); *see also* JUDICIAL STANDARDS, *supra* note 12 at 147.

[81] See Esteban v. Central Mo. State College, 277 F. Supp. 649, 651, *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970).

[82] *Id.*

[83] See Marin v. University of P.R., 377 F. Supp. 613, 623 (D.P.R. 1973).

[84] See Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1252 (E.D. Mich. 1984) (if an attorney had presented the university's case, the student "may have had a constitutional right to representation"), *aff'd per curiam*, 787 F.2d 590 (6th Cir. 1986); *see also* French v. Bashful, 303 F. Supp. 1333, 1337-38 (E.D. La. 1969) (court upheld right to counsel where a senior law student prosecuted the complaints of misconduct).

[85] *See Jaksa*, 597 F. Supp. at 1245 (student may have been entitled to counsel if the hearing had been subject to complex rules of evidence or procedure).

[86] In Gabrilowitz v. Newman, 582 F.2d 100, 105-06 (1st Cir. 1978), the court held that the university denied a student due process by refusing permission to his attorney

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In cases in which legal representation is considered a minimal due process requirement, courts differ as to whether the role of counsel is adversarial or advisory. Some decisions indicate that hearing boards should admit counsel in an advisory capacity,[88] give counsel a limited right of cross-examination,[89] or grant counsel full rights of cross-examination.[90] Notwithstanding that an attorney can conduct cross-ex-

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to assist the student's defense on a rape charge. In this situation, the dangers of self-incrimination and the student's "awareness of his own inability to evaluate the effect" of his statements on the pending criminal proceedings justify the presence of an attorney. *Id.* at 104. *See also* McLaughlin v. Massachusetts Maritime Acad., 564 F. Supp. 809, 811 (D. Mass. 1983) (court affirmed preliminary injunction to prevent cadet's dismissal until a subsequent hearing provided due process safeguard of counsel); *cf.* Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967) (non-criminal proceedings do not require representation by counsel); Nzuzve v. Castleton State College, 133 Vt. 225, 232, 335 A.2d 321, 366 (1975). *But see* Gorman v. University of R.I., 646 F. Supp. 799, 805-06 (D.R.I. 1986) (with no pending criminal charge, the university's denial of counsel did not violate the student's due process rights). *See generally* Comment, *Due Process Requires that Legal Counsel be Allowed to Advise a Student During University Disciplinary Proceedings Arising from the Same Facts as those of a Pending Criminal Charge*—Gabrilowitz v. Newman, 48 U. CIN. L. REV. 126 (1979).

[87] *See* Kusnir v. Leach, 64 Pa. Commw. 65, 439 A.2d 223, 227 (1982). The court ruled that the student's suspension was an "adjudication" within the meaning of the Administrative Agency Law. Because the college denied the student his statutory right to representation, the court remanded the case for new proceedings with the student's counsel.

[88] *See* Wimmer v. Lehman, 705 F.2d 1042, 1046 (4th Cir. 1983) (midshipman was not prejudiced by a refusal to allow counsel to examine and cross-examine witnesses, make objections, and argue the case), *cert. denied*, 464 U.S. 992 (1983); *e.g.*, Turof v. Kibbee, 527 F. Supp. 880, 886 n.12 (E.D.N.Y. 1981) (disciplinary committee not required to allow the student's counsel to conduct any witness examination); Esteban v. Central Mo. State College, 277 F. Supp. 649, 651-52 (W.D. Mo. 1967) (although due process requires that counsel be present at the hearing, only the student may question witnesses against him), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970); University of Houston v. Sabeti, 676 S.W.2d 685, 689 (Tex. Ct. App. 1984) (due process not denied when student's counsel, a law student, was not allowed to speak at the expulsion hearing). *See generally* Comment, *Setting Boundaries for Student Due Process:* Rustad v. U.S. Air Force *and the Right to Counsel in Disciplinary Dismissal Proceedings*, 52 DEN. U.L. REV. 109, 114-15 (1984); Comment, *The Right to Counsel in Disciplinary Proceedings in Public and Private Educational Institutions*, 9 CUMB. L. REV. 751, 753-54 (1979).

[89] *See* Dillon v. Pulaski County Special School Dist., 468 F. Supp. 54, 58 (E.D. Ark. 1978), *aff'd*, 594 F.2d 699 (8th Cir. 1979). The student's attorney was not allowed to examine the teacher who had witnessed the student's behavior. The court ordered reinstatement on procedural due process grounds, expunged the record, and awarded one dollar in nominal damages. *Id.* at 58. *But see Jaksa*, 597 F. Supp. at 1253 (construing *Dillon* to limit cross-examination to confront the school or teacher having primary knowledge of the facts relevant to the disciplinary proceeding).

[90] E.g., Fielder v. Board of Educ., 346 F. Supp. 722 (D. Neb. 1972) (right to counsel and cross-examination by counsel is at least "good technique"); Speake v. Grantham, 317 F. Supp. 1253, 1257-58 (S.D. Miss. 1970) (students and their counsel shall have the right of cross-examination), *aff'd per curiam*, 440 F.2d 1351 (5th Cir. 1971); French v. Bashful, 303 F. Supp. 1333, 1338 (E.D. La. 1969) (court limited its holding that a student be represented by "retained legal counsel as opposed to appointed counsel").

amination more effectively than a student, this procedural safeguard appears burdensome to many courts.[91] Although ruling that a pending criminal charge entitled a student to counsel at a disciplinary hearing, the First Circuit limited counsel's role to an advisory capacity.[92] The court noted that the presence of counsel should not burden the university because due process requires counsel only "for a truly unusual situation."[93]

*Hart v. Ferris State College*[94] specifically addressed whether due process entitles the student's counsel to cross-examine witnesses, or merely provide advice and consultation, with the student questioning witnesses. The court applied the *Mathews*[95] analysis to conclude that the probable value of the cross-examination by student's counsel is minimal compared to the significant burden it would impose.[96] The *Mathews* due process balancing test provides a compelling rationale for at least limited participation by a student's legal counsel. While the courts have established parameters to determine the need for counsel, courts have demurred the bounds for counsel's role to the university's discretion. The divided case law illustrates the need for the United States Supreme Court to resolve the split among the federal courts regarding the role of counsel in student disciplinary hearings.

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[91] *See* Gabrilowitz v. Newman, 582 F.2d 100, 106 (1st Cir. 1978) (counsel's limited role would not be very intrusive and would not place any financial or administrative burden upon the university); Dixon v. Alabama Bd. of Educ., 294 F.2d 150, 159 (1961) (the right to cross-examine witnesses, "might be detrimental to the college's educational atmosphere and impractical to carry out"), *cert. denied*, 368 U.S. 930 (1961).

[92] *Gabrilowitz*, 582 F.2d at 106. The court stated:

> Counsel's principal functions would be to advise appellee whether he should answer questions and what he should not say so as to safeguard appellee from self-incrimination; and to observe the proceeding first-hand so as to be better prepared to deal with attempts to introduce evidence from the hearing at a later criminal proceeding.

*Id.*

[93] *Id.*

[94] 557 F. Supp. 1379, 1386-87 (W.D. Mich. 1983). The court's ruling, however, was limited to denial of the student's request for preliminary injunctive relief. In emphasizing that it was not ruling on the merits of the student's claims, the court stated that additional relevant evidence could be presented. *Id.* at 1391.

[95] Mathews v. Eldridge, 424 U.S. 319, 335 (1976). *See supra* notes 46-48 and accompanying text. In *Gabrilowitz*, 582 F.2d at 105, the First Circuit applied *Mathews* and concluded that due process required a limited role for student's counsel.

[96] Hart v. Ferris State College, 557 F. Supp. 1379, 1387-88 (W.D. Mich. 1983). The court first held that: (1) the right to public education is a substantial one; and (2) the risk of error in the process employed by the college is relatively slight. The court noted that:

> [A] more active role by counsel would inevitably be more intrusive from the College's point of view. If plaintiff's counsel were permitted to cross-examine witnesses, the College might well find it desirable to have counsel ready to represent its own interest in insuring that witnesses not be harassed and that plaintiff's witnesses be subjected to equally searching cross-examination.

### E. *Producing, Confronting, and Cross-Examining Witnesses*

Confronting and cross-examining witnesses is an important notion in traditional concepts of justice and fair play. In *Goldberg v. Kelley*[97] the United States Supreme Court stated: "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."[98] Both *Goss*[99] and *Dixon*[100] require that school officials inform a student who made the accusations. Traditionally, courts have found the student's right to confront the accuser in disciplinary hearings an essential element of due process.[101] Generally, this reasoning has been extended to require university officials to provide a list of witnesses and/or a summary of their testimony.[102] If university officials permit a student to confront and cross-examine witnesses, this right is usually limited to those witnesses who appear at the hearing.[103] Because a university has no subpoena power, a student has no right to require its officials to produce witnesses.[104] Although frustrating, a student's inability to compel the appearance of witnesses "does not rise to the level of a constitutional deprivation."[105]

Several courts have held that the fourteenth amendment does not require cross-examination of witnesses by the accused,[106] not even regarding biases,[107] in the hearing. Although holding that students have no right to cross-examination, the Second Circuit noted that if the case "had resolved itself into a problem of credibility, cross-examination of witnesses might have been essential to a fair hearing."[108] Some courts recognize a student's right to cross-examine witnesses.[109] These cases demonstrate the courts' concern that eyewitness accounts of student misconduct be balanced and thorough.

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[97] 397 U.S. 254 (1970).

[98] *Id.* at 269.

[99] 419 U.S. 565, 581 (1975).

[100] 294 F.2d 150, 158 (1961), *cert. denied*, 368 U.S. 930 (1961). The court added, however, that "[t]his is not to imply that . . . the right to cross-examine witnesses is required." *Id.*

[101] In a century-old decision, a court held that a student suspended for riotous conduct was "entitled to know what testimony had been given against him, and by whom it had been delivered, and that the proofs be made openly and in his presence, with a full opportunity to question the witnesses and to call others to explain or contradict their testimony." Hill v. McCauley, 3 Pa. Co. Ct. 77, 82 (1887).

[102] See Herman v. University of S.C., 341 F. Supp. 226, 230 (D.S.C. 1971), *aff'd per curiam*, 457 F.2d 902 (4th Cir. 1972) ("[The student] is entitled to the names of witnesses to be used against him."); Nash v. Auburn Univ., 812 F.2d 655, 663 (11th Cir. 1987) (A student is "not constitutionally entitled to advance notice of statements by witnesses who, along with the [student], were to appear at the hearing."). *But see* Whiteside v. Kay, 446 F. Supp. 716, 721 (W.D. La. 1978) (School officials are "not required to provide students with a list of witnesses and a summary of their testimony.").

[103] See Boykins v. Fairfield Bd. of Educ., 492 F.2d 697, 701-02 (5th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

[104] See Hart v. Ferris State College, 557 F. Supp. 1379, 1389 (W.D. Mich. 1983) ("It is not clear how the College could be required to compel the attendance of witnesses over whom it has no power by subpoena or otherwise.").

[105] Turof v. Kibbee, 527 F. Supp. 880, 886 (E.D.N.Y. 1981).

[106] See *Boykins*, 492 F.2d at 701 (no right to confront or cross-examine witnesses exists in a high school disciplinary action); *Herman*, 341 F. Supp. at 230 ("[The student] may not be necessarily entitled to be confronted by the witnesses at the hearing"); Dixon v. Alabama Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961) (due process does not require the right to cross-examine witnesses), *cert. denied*, 368 U.S. 930 (1961); *accord* Blanton

The university has a stronger case when it wishes to safeguard student witnesses.[110] Some courts have held that when accusers are fellow students, not school officials, they may remain anonymous to guard against reprisals.[111] While this safeguard has merit, it may force an accused student to answer to an unnamed accuser or to written allegations. This solution is, at best, tenuous and not advised.

### F. *Student's Privilege Against Self-Incrimination*

Although a disciplinary hearing provides the student an opportunity to explain the alleged misconduct, some students claim a right to be silent during the hearing. University officials may not deny a student the right to remain silent. In *Picozzi v. Sandalow*[112] the court ruled that the law school dean did not deprive the student of his privilege against self-incrimination by offering the student the choice of a polygraph test or a hearing. The court also noted that "even though a person may assert the privilege against self-incrimination during a civil proceeding, the privilege protects a person from only criminal exposure."[113]

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v. State Univ. of N.Y., 489 F.2d 377, 385 (2d Cir. 1973); Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1252 (E.D. Mich. 1984) ("The Constitution does not confer on [the student] the right to cross-examine his accuser in a school disciplinary hearing."), *aff'd per curiam*, 787 F.2d 590 (6th Cir. 1986).

[107] See Gorman v. University of R.I., 646 F. Supp. 799, 807 (D.R.I. 1986) (because the student was permitted to cross-examine all adverse witnesses, the court found no due process violations with respect to cross-examination).

[108] Winnick v. Manning, 460 F.2d 545, 550 (2d Cir. 1970).

[109] See Dillon v. Pulaski County Special School Dist., 468 F. Supp. 54, 58 (E.D. Ark. 1978) (where witness testimony was critical, "due process clearly demanded that the student be given an opportunity to question" the witness), *aff'd*, 594 F.2d 699 (8th Cir. 1979); Gonzales v. McUen, 435 F. Supp. 460, 469 (C.D. Cal. 1977) ("[D]ue process does not permit admission of *ex parte* evidence by witnesses not under oath and not subject to examination by the accused student."); Marin v. University of P.R., 377 F. Supp. 613, 623 (D.P.R. 1974) (student may "cross-examine opposing witnesses with the assistance of counsel").

[110] *See Jaksa*, 597 F. Supp. at 1253; Graham v. Knutzen, 351 F. Supp. 642, 666 (D. Neb. 1972); *see also* Hannah v. Larche, 363 U.S. 420, 442 (1960).

[111] *See Dillon*, 468 F. Supp. at 58 ("[T]he need for anonymity of student accusers, who might otherwise be the victim of reprisals from fellow students, could prevail over the right to confrontation."), *aff'd per curiam*, 594 F.2d 699 (8th Cir. 1979); *see also* Fielder v. Board of Educ., 346 F. Supp. 722 (D. Neb. 1972) (teacher witness); DeJesus v. Penberthy, 344 F. Supp. 70 (D. Conn. 1972) (student witness).

[112] 623 F. Supp. 1571, 1582 (E.D. Mich. 1986).

[113] *Id. See, e.g.*, Kastigar v. United States, 406 U.S. 441, 444 (1972).

Frequently, students assert their privilege against self-incrimination when they attempt to postpone the college disciplinary hearing until the court resolves a related criminal charge. A student may argue that a disciplinary hearing, held prior to resolution of the criminal charges, forces the student to testify to avoid expulsion. Since such testimony may be used against the student at the subsequent criminal trial, it may deny fifth amendment rights. The First Circuit metaphorically described the student's dilemma in such a situation:

> [T]he hearing procedures do not place appellee 'between the rock and the whirlpool.' He can, if he wishes, stay out of the stream and watch the proceedings from dry land. But, if he does so, he forfeits any opportunity to control the direction of the current. Appellee must decide whether or not to testify at the hearing with the knowledge that, if he does, his statements may be used against him in the criminal case.
>
> . . . .
>
> . . . Although the choice facing him is difficult, that does not make it unconstitutional.[114]

Courts which do not require postponing the student's disciplinary hearing until completion of the criminal proceedings,[115] rely on the Supreme Court's pronouncement in *Garrity v. New Jersey*[116] that the state may not fire police officers for invoking their privilege against self-incrimination during a civil hearing regarding police conduct.[117] Following *Garrity* and its progeny, the court in *Hart v. Ferris State College* ruled that the college did not violate due process in its failure to adjourn the disciplinary hearing until resolution of the student's pending criminal charges.[118] In refusing to grant an injunction against the proposed disciplinary proceeding, the court stated: "It is clear that plaintiff is permitted to remain silent. It appears that her silence may not be used against her. There is no indication that the silence of an accused will be considered as either pointing to or being conclusive of guilt."[119]

Additionally, other courts have explained that university-imposed discipline need not await the outcome of other proceedings because this result fairly balances all competing interests.[120] University officials may proceed with a disciplinary hearing, and not violate a student's privilege against self-incrimination, even pending a student's criminal proceedings. This course of action allows the university to demonstrate that it takes the allegations seriously. Moreover, because criminal cases can take over a year to be resolved, delay of the disciplinary hearing may cause students to lose respect for the rules of conduct. Consequently, in most circumstances, university officials should not delay the disciplinary proceeding.

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[114] Gabrilowitz v. Newman, 582 F.2d 100, 104 (1st Cir. 1978) (citation omitted).

[115] *See* Wimmer v. Lehman, 705 F.2d 1402, 1407 (4th Cir. 1983), *cert. denied*, 464 U.S. 992 (1983); *Gabrilowitz*, 582 F.2d at 104; Keene v. Rodgers, 316 F. Supp. 217, 221-22 n.4 (D. Me. 1970); Furutani v. Ewigleben, 297 F. Supp. 1163, 1165 (N.D. Cal. 1969); Nzuzve v. Castleton State College, 133 Vt. 225, 335 A.2d 231, 325-26 (1975); Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, 57 Cal. Rptr. 463, 474 (1967).

[116] 385 U.S. 493 (1967).

[117] *Id.* at 500.

[118] 557 F. Supp. 1379, 1384 (W.D. Mich. 1983). The prosecutor publicly stated his intention to subpoena any testimony at the student disciplinary hearing which pertained to the related criminal charge.

[119] *Id.* at 1385.

### G. *Substantive Evidence*

University officials bear the burden of proof in producing evidence to sustain the charges against the student and must base their disciplinary decisions on substantial evidence.[121] Substantial evidence requires "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[122] While the substantial evidence standard remains the norm, one federal district court found this standard too low and recommended that uni-

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[120] Educational institutions have both

> a need and a right to formulate their own standards and to enforce them; such enforcement is only coincidentally related to criminal charges and the defense against them. To hold otherwise would . . . lead logically to the conclusion that civil remedies must, as a matter of law, wait for determination until related criminal charges are disposed of.

*Nzuzve*, 335 A.2d at 325. The *Nzuzve* court relied on Goldberg v. Regents of Univ. of Calif., 248 Cal. App. 2d 167, 57 Cal. Rptr. 463 (1967), in ruling that discipline imposed by a college or university need not await the outcome of other proceedings. *See generally* DeVita v. Sills, 422 F.2d 1172, 1178-80 (3d Cir. 1970) (The fifth amendment does not require postponement of civil proceedings whenever related criminal charges are pending.).

[121] *See* Slaughter v. Brigham Young Univ., 514 F.2d 622, 625 (10th Cir. 1975) (some weight must be given to determining the facts when there is substantial evidence), *cert. denied*, 423 U.S. 898 (1975); Givens v. Poe, 346 F. Supp. 202, 209 (W.D.N.C. 1972) (due process requires that the decision of the authorities be based upon substantial evidence); Herman v. University of S.C., 341 F. Supp. 226, 230 (D.S.C. 1971) ("No serious disciplinary action can be taken unless it is based on substantive evidence."), *aff'd per curiam*, 457 F.2d 902 (4th Cir. 1972); Center for Participant Educ. v. Marshall, 337 F. Supp. 126, 136 (N.D. Fla. 1972) ("[I]n order to satisfy due process requirements, a university disciplinary proceeding should afford the student . . . punishment based only upon substantial evidence adduced at the hearing."); Speake v. Grantham, 317 F. Supp. 1253, 1281 (S.D. Miss. 1970) (no disciplinary action may be taken on grounds not supported by substantial evidence), *aff'd*, 440 F.2d 1351 (5th Cir. 1971). *But see* McDonald v. Board of Trustees of Univ. of Ill., 375 F. Supp. 95, 102 (N.D. Ill. 1974) (court espoused the "same evidence" due process standard); *accord* Gorman v. University of R.I., 646 F. Supp. 799, 814 (D.R.I. 1986); *cf.* Smyth v. Lubbers, 398 F. Supp. 777, 799 (W.D. Mich. 1975) (substantial evidence standard is constitutionally inadequate because it "provides no intelligible standard" or is "lower than what is constitutionally required").

[122] Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) (cited with approval in Sill v. Pennsylvania State Univ., 318 F. Supp. 608, 621 (1970), *aff'd*, 462 F.2d 463 (3d Cir. 1972)).

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versity officials adopt the higher standard of "clear and convincing evidence."[123] Because classrooms are not courtrooms, student disciplinary proceedings need not conform to the formal procedures and rules of evidence which govern court trials. Although the United States Supreme Court has been silent concerning evidentiary rights in the disciplinary dismissal context, some federal district courts have addressed this issue.[124] Very few cases have addressed the admissibility of hearsay evidence in a student disciplinary proceeding.[125] School officials need not employ formal evidentiary procedures in student disciplinary hearings. Even if a student's alleged misconduct is the basis of a criminal charge, courts do not require school officials to adopt the burden of proof applicable to criminal proceedings. Unless an institution's code of conduct provides otherwise, basing a decision on substantial evidence is acceptable.

### H. *Record of Proceedings and Statement of Decision*

While some courts require that a university furnish a student with a transcript of the disciplinary proceedings,[126] other courts grant a party only the right to make a record of the proceedings,[127] and still other courts find no due process rights to a hearing transcript.[128] Applying the *Mathews* test to this issue,[129] the court in *Gorman v. University of*

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[123] *Smyth*, 398 F. Supp. at 797-99. In analyzing the hierarchical standards of proof (preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt), one commentator concluded that the "clear and convincing" standard provides a "safe harbor" for campus disciplinary proceedings. *See* Long, *The Standard of Proof in Student Disciplinary Cases*, 12 J.C. & U.L. 71, 81 (1985).

[124] In Morale v. Grigel, 422 F. Supp. 988, 1001 (D.N.H. 1976), and Ekelund v. Secretary of Commerce, 418 F. Supp. 102, 106 (E.D.N.Y. 1976), the courts refrained from applying the exclusionary rule to evidence in student dismissal proceedings. *Contra Smyth*, 398 F. Supp. at 795 (evidence seized in the illegal search of a student's room may not be used in the college disciplinary proceedings).

[125] Cases which discuss hearsay are limited to secondary schools. *See generally* Annotation, *Admissibility of Hearsay Evidence in Student Disciplinary Proceedings*, 30 A.L.R. 4TH 935 (1984).

[126] *See* Marin v. University of P.R., 377 F. Supp. 613, 623 (D.P.R. 1973) (requiring that the proceedings be transcribed).

[127] *See* Givens v. Poe, 346 F. Supp. 202, 209 (W.D.N.C. 1972) (due process requires the right to make a record); Esteban v. Central Mo. State College, 277 F. Supp. 649, 652 (W.D. Mo. 1967) ("[E]ither side may, at its own expense, make a record of the events at the hearing."), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970).

[128] *See* Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1252 (E.D. Mich. 1984) (due process does not require the university to provide a verbatim transcript), *aff'd per curiam*, 787 F.2d 590 (6th Cir. 1986); Sohmer v. Kinnard, 535 F. Supp. 50, 54 (D. Md. 1982) ("[N]one of the student discipline cases suggest that a full transcript of the hearing is required."); *Morale*, 422 F. Supp. at 1003 (college's failure to make a record of the hearing did not amount to constitutional error); Whitfield v. Simpson, 312 F. Supp. 889, 894 (E.D. Ill. 1970) (no need for stenographic or mechanical recording of the proceedings).

[129] "[T]he interests at stake are substantial, the risk of error is significant, and the corrective value of a verbatim record is similarly significant." 646 F. Supp. at 808. *See supra* notes 46-48 and accompanying text.

*Rhode Island*[130] ruled that "where no other verbatim record of the proceeding will be made available, a student threatened with a year-long disciplinary suspension from a public university has the right to tape-record the disciplinary hearings at his or her own expense."[131] However, due process does not require the university to provide a free transcript of the hearing to the student.[132]

The institution's appellate procedure may determine whether a record of the hearing must be provided. Where appellate procedures provide a review of the hearing board's decision, as opposed to a de novo hearing, "the student needs a thorough and accurate record of the hearings below to maintain a fair defense on appeal."[133] However, where the university does not provide a record, a court may require a de novo hearing.[134] Some courts do not require a statement of the hearing panel's final decision.[135] Nonetheless, if the hearing is not before the body that will make the ultimate disciplinary decision, then the hearing panel should file a written report of its findings and make this report available to the student.[136] While courts do not generally require that universities provide legal transcripts of student disciplinary hearings, university officials should at least keep a taped record of the proceedings.

## CONCLUSION

Student due process rights in college and university disciplinary matters vary in degree and kind. Depending upon the nature of the dispute, the courts accord differing levels of procedural protection to the student.[137] To protect both the institution and the student, university officials must provide procedural safeguards for student disciplinary matters. Although case law demonstrates that notice, a hearing, and substantive evidence are required, courts repeatedly emphasize that due process in student disciplinary matters does not have to meet the standards of the criminal law model.[138]

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[130] 646 F. Supp. 799 (D.R.I. 1986).

[131] *Id.* at 808.

[132] *Id.*

[133] *Id.* at 809.

[134] *See* Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747, 768 (W.D. La. 1968); *see also* Morale v. Grigel, 422 F. Supp. 998, 1003 (D.N.H. 1976) (although the court required written reasons for the student's suspension, the college's failure to make a record did not amount to constitutional error where the student's appeal right consisted of a de novo trial).

[135] *See Jaksa*, 597 F. Supp. at 1255 ("Articulating the obvious to plaintiff would not reduce a risk of erroneous deprivation of plaintiff's rights."); Bleicker v. Board of Trustees of Ohio State Univ., 485 F. Supp. 1381, 1387-88 (S.D. Ohio 1980) (written minutes from student council hearing does not violate due process); Herman v. University of S.C., 341 F. Supp. 226, 232 (D.S.C. 1971) (no requirement in "law or reason" for the Board to issue written findings of fact or conclusions of law similar to those in the Federal Rules of Civil Procedure), *aff'd*, 457 F.2d 902 (4th Cir. 1972).

[136] See Dixon v. Alabama Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961) ("[T]he results and findings of the hearing should be presented in a report open to the student's inspection."), *cert. denied*, 368 U.S. 930 (1961); *Morale*, 424 F. Supp. at 1003 (written reasons for a student's suspension are constitutionally mandated). *See also* 5 Am. Jur. Pl. and Pr. Forms (Rev) *College and Universities* Form 22 (1968) (grounds for expulsion found at duly conducted hearing).

University officials must walk a fine line between the competing interests in a student disciplinary matter. While fundamental fairness should be the overriding consideration, expediency, expense, and a desire to avoid litigation also raise concerns for the institution. Consequently, colleges and universities should develop policies, in view of judicial decisions, that meet these needs. Due process in student disciplinary matters presents a volatile paradox: bypassing procedural safeguards may invite academic tyranny, while a preoccupation with due process may result in harmful proceduralism. Distrust creates more formalized due process procedures in schools, whereas nonformalism is founded on trust.[139] While school officials continue to develop or refine disciplinary procedures, they must maintain a careful balance. Ultimately, a good student disciplinary procedure goes beyond constitutional minima to avoid arbitrariness and absolutism and to promote fairness, trust, and flexibility.

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[137] One commentator warns: "Although the trend toward written codes is a sound one, legally speaking, because it gives students fairer notice of what is expected from them and often results in a better conceived and administered system, written rules also provide a specific target to aim at in a lawsuit." W. Kaplin, The Law of Higher Education 292 (1985). *See also* Pavela, *Limiting the "Pursuit of Perfect Justice" on Campus: A Proposed Code of Student Conduct*, 6 J.C. & U.L. 137 (1979).

[138] *See supra* note 43.

[139] Professor Gilmore stated:

> The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. . . . The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.

G. Gilmore, The Ages of American Law 111 (1977) (quoted in Yodof, *Legalization of Dispute Resolution, Distrust of Authority, and Organizational Theory: Implementing Due Process for Students in the Public Schools*, 1981 Wis. L.R. 891, 923).

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# Students' Right to Counsel in University Disciplinary Proceedings

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## INTRODUCTION

In recent years, courts have afforded college[1] students at public institutions a number of constitutional rights previously ignored on campuses. The first amendment protects students' rights to freedom of speech, freedom of association, and the free exercise of religion.[2] The fourth amendment has been held to protect students from unreasonable searches and seizures in university housing.[3] Students are also entitled to due process as provided by the fourteenth amendment when facing disciplinary sanctions.[4] One constitutional safeguard which courts reluctantly extend to college students is the right to counsel under the Due Process Clause of the fourteenth amendment.[5]

Students usually seek the assistance[6] of counsel when facing severe disciplinary sanctions, such as suspension or expulsion. Considering

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[1] "College" and "university" are used interchangeably throughout this article.

[2] *See* Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 506, 89 S. Ct. 733, 736 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); Healy v. James, 408 U.S. 169, 92 S. Ct. 2338 (1972) (the first amendment protects students' rights to freedom of association); Widmar v. Vincent, 454 U.S. 263, 102 S. Ct. 269 (1981) (students' rights to engage in religious worship and discussion are forms of speech and association protected under the first amendment).

[3] *See* Piazzolo v. Watkins, 442 F.2d 284 (5th Cir. 1971).

[4] *See* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930, 82 S. Ct. 366 (1961); Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729 (1975).

[5] The sixth amendment provides that "[i]n all criminal prosecutions, the accused . . . shall have the assistance of counsel for his defense." U.S. CONST. amend. VI. Because university disciplinary proceedings are not criminal prosecutions, sixth amendment protections are inapplicable. If and when students are entitled to the assistance of counsel in disciplinary proceedings, that right must attach under the Due Process Clause of the fourteenth amendment.

[6] Assistance of counsel as it is used in this article refers to attorneys' advice, assistance in the preparation of a defense, and accompaniment of students when they act for themselves in disciplinary proceedings. This is distinct from attorneys' representation of students, which refers to attorneys' actual participation in proceedings (*i.e.*, through the direct or cross-examination of witnesses), and so on. Courts allow the *assistance* of counsel in certain circumstances, but generally prohibit *representation*. *See infra* notes 69-107 and accompanying text.

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the potentially damaging consequences in such situations, it seems odd that courts are generally unwilling to allow students to be assisted by attorneys. University administrators, charged with enforcing student-conduct rules, favorably view courts' reluctance to allow attorneys to assist students in campus hearings. Administrators want to keep attorneys out of hearings for two primary reasons: First, college discipline is seen as serving educational and counseling purposes, which attorneys are considered incapable of enhancing.[7] Second, administrators are concerned that attorneys would employ technical legal maneuvers or "chicanery," which would escalate hearings into adversarial proceedings.[8]

Nonetheless, students have been granted the right to counsel in disciplinary proceedings under some circumstances. It is important that university administrators recognize these circumstances, so that students' rights may be protected.

## II. Background

Inquiries into students' right to counsel in university disciplinary proceedings must begin with an understanding of the theoretical foundations for university regulation of student conduct. This background provides a perspective from which students' rights may be considered.

### A. *In Loco Parentis*

For many years colleges were the guardians of their students' health, welfare, and morals, and closely regulated their students' lives. Students were expelled from colleges for such petty violations as smoking.[9] Schools derived this broad authority to regulate student conduct from the common law doctrine of "in loco parentis," meaning that schools stood, literally, "in the place of a parent."[10] The clearest judicial pronouncement of the in loco parentis doctrine appears in *Gott v. Berea College*.[11] In upholding the College's authority to prevent its students from frequenting local restaurants and taverns, the court stated:

> College authorities stand in loco parentis concerning the physical and moral welfare and mental training of their pupils, and we are unable to see why . . . they may not make any rule or regulation for the government or betterment of their pupils that a parent could make for the same purpose.[12]

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[7] *See* Weisinger & Crafts, *Right to Counsel: Legal and Educational Considerations*, 17(2) NASPA Journal 27, 30 (1979).

[8] *Id.* at 30.

[9] McClintock v. Lake Forest Univ., 22 Ill. App. 468 (1921).

[10] Black's Law Dictionary 403 (abr. 5th ed. 1983).

[11] 161 S.W. 204 (Ky. 1913).

[12] 161 S.W. at 206.

Burdensome as this relationship might seem, it was expected by parents, acquiesced to by students, and accepted by colleges.

Use of the in loco parentis doctrine as a basis for describing the student-university relationship has essentially disappeared. The principal reason for this is the practical difficulty of conceiving of colleges and universities as substitute parents when most of their students have reached the age of majority, or are otherwise beyond parental control.[13] The demise of the doctrine began in the late 1960's when, in the wake of student protests against racial inequality and the Vietnam War, a new student independence emerged.[14]

Recently, several authors have suggested that in loco parentis has reemerged.[15] The doctrine's return is supposedly evidenced by (1) students' demands as consumers for college placement, financial aid, and counseling services;[16] and (2) students' suits against institutions when harmed as a result of criminal attacks on campus, the negligent acts of others, or even their own acts.[17] However, student consumerism (and the associated demands for better institutional services) has long been recognized as a separate trend and has little to do with students' desires for universities to resume control of their lives. Furthermore, students' suits against universities for physical harm suffered have, with a few exceptions,[18] been unsuccessful.[19] Courts have expressly rejected in loco parentis as a basis for liability, making clear students' status as independent adults.[20] It is equally likely that students sue institutions not because they think colleges the paternal guardians of

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[13] Lerblance, *Legal and Educational Aspects of Student Dismissal: A View From the Law School*, 33 S.W.L.J. 605, 607 (1979).

[14] *See* Szablewicz & Gibbs, *Colleges' Increasing Exposure to Liability: The New In Loco Parentis*, 15 J.L. & EDUC. 453 (1987).

[15] *See, e.g.*, Gibbs & Szablewicz, *Colleges' New Liabilities: An Emerging New In Loco Parentis*, 29(2) J.C. STUDENT DEVELOPMENT 100 (1988); Gregory & Ballou, *In Loco Parentis Reinventis: Is There Still a Parenting Function in Higher Education?*, 24(2) NASPA J. 28 (1986); Szablewicz & Gibbs, *supra* note 14; Zirkel & Reichner, *Is the In Loco Parentis Doctrine Dead?*, 15 J.L. & EDUC. 271 (1986).

[16] *See* Gregory & Ballou, *supra* note 15, at 30-31; Szablewicz & Gibbs, *supra* note 14, at 453.

[17] *See* Szablewicz & Gibbs, *supra* note 14, at 453.

[18] *See, e.g.*, Mullins v. Pine Manor College, 449 N.E.2d 331 (Mass. 1983) (college liable for on-campus sexual assault of student).

[19] *See, e.g.*, Relyea v. State, 385 So. 2d 1378 (Fla. Dist. Ct. App. 1980) (college not liable for on-campus assault on student); Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979) (college not liable when student injured in traffic accident following class party), *cert. denied*, 446 U.S. 909, 100 S. Ct. 1836 (1980); Beach v. University of Utah, 726 P.2d 413, (Utah 1986) (university not liable when student injured in fall on field trip); Whitlock v. University of Denver, 712 P.2d 1072 (Colo. Ct. App. 1985), *rev'd*, 744 P.2d 54 (Colo. 1987) (university not liable when student injured in trampoline accident at fraternity house); Furek v. University of Del., 535 A.2d 408 (Del. 1987) (university not liable when student injured in hazing incident at fraternity house).

[20] *See* Case Comment, *Eiseman v. State of New York: The Duty of a College to Protect Its Students From Harm by Other Students Admitted Under Special Programs*, 14 J.C.U.L. 591, 593 nn.13, 14 (1988), and accompanying text.

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their safety, but because they think colleges have "deep pockets." In fact, there seems to be no evidence that in loco parentis has returned.

### B. *Fiduciary Theory*

A second basis for university regulation of student conduct has been proposed in terms of a fiduciary relationship between institutions and their students. According to this theory, universities establish environments conducive to their students' mental development and general benefit.[21] In return, students subject themselves to examinations, often disclose confidential health, background, and financial information, and are asked to place their trust in personal and career counselors.[22] This confidence which, out of necessity, students must show in institutions, is thought to equal that placed in a fiduciary. In fact, it has been compared to the confidence one would place in a clergyman, doctor, lawyer, or corporate director.[23] This relationship allows universities to make decisions, disciplinary or otherwise, that are believed to be in students' best interests.

Despite the apparent applicability of the fiduciary theory, courts have seldom applied it. There is no explanation for this deficiency, but speculation has centered on (1) lawyers' failure to pursue this approach in analyzing their cases, and (2) courts' reluctance during the development of education law in the early 1900's to tamper with private relationships outwardly contractual.[24] Nevertheless, courts' deference to decisions made by university administrators in academic competence cases is sometimes attributed to the existence of fiduciary relationships.[25]

### C. *Contract Theory*

The most widely-accepted description of the student-university relationship follows contract theory. Courts in the United States characterized the relationship between colleges and students as contractual as early as 1891.[26] The contract theory assumes that students and universities are parties to a contract, each conferring some benefits and accepting some burdens. Universities, by recruiting students, make offers which students accept by enrolling. Students agree to pay tuition and other costs, and universities agree to provide instruction and, ultimately, degrees, conditioned upon students' satisfactory academic performance and compliance with institutional policies.

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[21] *See* Goldman, *The University and the Liberty of Its Students—A Fiduciary Theory*, 54 KY. L.J. 643, 671-72 (1966).

[22] *Id.*

[23] *Id.* at 672.

[24] *See id.*, at 673; *see generally* Fowler, *The Legal Relationship Between the American College Student and the College: An Historical Perspective and the Renewal of a Proposal*, 13 J.L. & EDUC. 401, 414-16 (1984).

[25] *See* R. HENDRICKSON & A. GIBBS, THE COLLEGE, THE CONSTITUTION AND THE CONSUMER STUDENT 3 (1986).

[26] *See* Jennings, *Breach of Contract Suits by Students Against Postsecondary Education Institutions: Can They Succeed?*, 7 J.C.U.L. 191 (1980-81).

Most contract cases involving students and universities have been decided for the purpose of determining universities' power to enforce their "contracts" with students by expelling students.[27] More recently, educational contract cases have strayed from disciplinary matters, and have included disputes over universities' duties to provide promised curricula, atmospheres conducive to learning, and educational progress free from invidious discrimination.[28]

The educational contract is more implied than express. The contract between a student and a university is obviously not embodied in a document negotiated by the parties. The contract's terms are usually spread throughout a number of documents, including registration forms, catalogs, student handbooks, and other institutional publications.[29] Oral assertions might also be among the terms.[30] The general nature of the student-university contractual relationship may also be found in the reasonable expectations of the parties arising from the contract terms.[31]

The application of contract theory to the student-university relationship may be unfair to students. The written materials that generally constitute the contract, ranging from handbooks to catalogs, are not drafted to be contracts. It is doubtful that students perceive these materials to be contracts.[32] Furthermore, because catalogs, handbooks, and other materials cannot be written to provide for all contingencies, courts often interpret generally-worded sections to allow universities' actions.[33]

Despite criticism of the contractual theory, most courts cite contract doctrine as the controlling relation between students and universities, especially when the universities are private.[34] Although reliance on contract theory has traditionally favored universities and limited students' rights,[35] such results are not guaranteed. Indeed, courts have construed contracts in favor of students in disciplinary cases.[36] Contract theory may protect students who are sanctioned by universities in violation of the universities' own procedures. It might also be argued that the contractual principle of reasonableness requires courts to find that the "contract" contains implied terms which requires universities to act in a fair and reasonable manner when they conduct disciplinary proceedings.[37] Thus, students may be protected from arbitrary disciplinary action by virtue of contractual relationships with the colleges they attend.

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[27] See Nordin, *The Contract to Educate: Toward a More Workable Theory of the Student-University Relationship*, 8 J.C.U.L. 141, 152 (1981-82).

[28] *Id.* at 156.

[29] Goldman, *supra* note 21, at 651.

[30] Nordin, *supra* note 27, at 156.

[31] *Id.* at 158.

[32] See Dodd, *The Non-Contractual Nature of the Student-University Contractual Relationship*, 33 KAN. L. REV. 701, 714 (1985).

[33] *Id.* at 715.

[34] See, e.g., Zumbrun v. University of S. Cal., 101 Cal. Rptr. 499, 504 (1972) ("The basic legal relation between a student and a private university or college is contractual.").

[35] Lerblance, *supra* note 13, at 608.

[36] See, e.g., Andersen v. Regents of the Univ. of Cal., 99 Cal. Rptr. 531 (1972).

## III. DUE PROCESS CONSTRAINTS ON THE DISCIPLINARY PROCESS

All examinations of students' rights to due process, including the right to counsel, first require a determination of whether the students' interests fall "within the contemplation of the 'liberty or property' language of the Fourteenth Amendment."[38] Property interests may be created when there is legitimate reliance on a benefit.[39] College students in good academic standing legitimately expect to receive their degrees upon completion of their course requirements. As a result, students possess property interests in their educations.[40] Students' liberty interests are usually infringed by the stigma that accompanies suspension or expulsion.[41] Thus, at least at public institutions, students facing significant disciplinary penalties are entitled to due process protections.[42]

### A. *The Development of Due Process on Campus*

Until the early 1960's, federal courts declined to consider whether student dismissals might violate due process. Judicial review was denied on the ground that federal courts lacked jurisdiction,[43] or, if they had jurisdiction, that a college education was a privilege and not a right.[44]

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[37] Lerblance, *supra* note 13, at 609.

[38] Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600 (1972). The fourteenth amendment provides, in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[39] *See* Note, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 YALE L.J. 2132, 2136 (1987) (citing *Board of Regents v. Roth*, 408 U.S. 564, 576-77, 92 S. Ct. 2701, 2708-09 (1972)).

[40] *Id.* at.2137.

[41] In Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S. Ct. 507, 510 (1971), the Supreme Court explained that liberty interests protected by due process exist "[w]here a person's good name, reputation, honor or integrity [are] at stake because of what the government is doing to him." This approach was scaled back in Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155 (1976), in which the Court held that not all defamations infringe liberty interests. Instead, stigma must accompany the deprivation of a right previously held under state law, or otherwise alter some legal status, such as employment. *Id.* at 708-09, 91 S. Ct. at 1164.

The significant alteration of suspended or expelled students' status is most evident in their inability to enroll at other universities. Subsequent universities to which students may apply are always aware of prior dismissals. *See* Note, *supra* note 39, at 2138. Consequently, dismissal from one university can mean the end of a student's education. *Id.* at 2138-39. Such results inflict both economic and emotional harm.

[42] For a discussion of the differences between public and private institutions, and the due process implications, see *infra* notes 129-55, and accompanying text.

This hands-off approach came to a halt in 1961 in the landmark case of *Dixon v. Alabama State Board of Education*.[45] In *Dixon*, the Fifth Circuit Court of Appeals ruled that the expulsion of six students from a state college for unspecified acts of misconduct, without notice of the charges against them, or an opportunity for a hearing, violated the due process clause of the fourteenth amendment. Even if the students' attendance at a state college were a privilege and not a right, the court observed, "it nonetheless remains true that the State cannot condition the granting of even a privilege upon the renunciation of the Constitutional right to procedural due process."[46] The court ruled that before a state school could expel students for disciplinary reasons, students were entitled to notice and a hearing.[47] *Dixon* did not mandate that college disciplinary proceedings mirror criminal trials. The court stated that "full-dress judicial hearings" were not necessary,[48] and that hearing procedures "should vary depending upon the circumstances of the particular case,"[49] so long as the "rudiments of an adversary proceeding" are preserved.[50]

*Dixon* established the foundation for students' rights to due process in university disciplinary proceedings. The *Dixon* court's discussion of what might constitute sufficient notice and an adequate hearing was relied upon in later cases to determine the propriety of universities' disciplinary proceedings.[51] Six years after *Dixon* was decided, a federal district court in *Esteban v. Central Missouri State College*,[52] more specifically defined the general due process requirements established in *Dixon*.

In *Esteban*, the College suspended the plaintiffs for their roles in student demonstrations. The court held that the students were not afforded procedural due process, and ordered the College to provide them with the following protections: (1) a written statement of the charges, for each student, made available at least ten days before the hearing; (2) a hearing before the person(s) having the power to suspend or expel; (3) the opportunity for advance inspection of any affidavits or exhibits that the College intended to produce at the hearing; (4) the right to have counsel present at the hearing to advise them (but not to cross-examine witnesses); (5) the opportunity to present their own version of the facts, including affidavits, exhibits, and witnesses; (6) the right to hear the evidence against them and personally (*i.e.*, not through counsel) question adverse witnesses; (7) a determination of the facts of each case based solely on the evidence presented at the hearing; (8) a written statement of the hearing officer's findings of fact; and (9) the right to make a record of the hearing at their own expense.[53] The Eighth Circuit Court of Appeals subsequently affirmed the decision.[54]

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[43] Lerblance, *supra* note 13, at 609.

[44] *Id.* at 609-10 (citing Hamilton v. Regents of the Univ. of Cal., 99 Cal. Rptr. 531 (1972)).

[45] 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930, 82 S. Ct. 368 (1961).

[46] *Id.* at 156.

[47] *Id.* at 158-59.

[48] *Id.* at 159.

[49] *Id.* at 158.

[50] *Id.* at 159.

[51] *See* Due v. Florida A. & M. Univ., 233 F. Supp. 396 (N.D. Fla. 1963).

[52] 277 F. Supp. 649 (W.D. Mo. 1967).

Most courts continue to focus on the flexible notice and hearing concept of *Dixon*,[55] and avoid the detail of *Esteban* when determining college students' due process rights. Nevertheless, the *Esteban* requirements illustrate the outer limits of what a court might consider.[56] At least one other court has reached those outer limits. In *Marin v. University of Puerto Rico*,[57] the federal district court ruled that the "minimum protection constitutionally required"[58] in disciplinary proceedings involving suspension included the right to counsel.[59] The court further mandated that accused students be allowed to cross-examine opposing witnesses with the assistance of counsel.[60] One recent article has suggested that *Marin* be adopted as the new standard to gauge whether college students have received due process in disciplinary proceedings.[61] However, the article failed to recognize that *Marin* has been disregarded even in the First Circuit,[62] of which the District of Puerto Rico is a part.[63] More properly, *Marin* should be viewed as an extreme case, with the *Dixon* requirements remaining the logical focus.

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[53] *Id.* at 651-52; W. KAPLIN, THE LAW OF HIGHER EDUCATION 304 (2d ed. 1986).

[54] 415 F.2d 1077 (8th Cir. 1969).

[55] W. KAPLIN, *supra* note 53, at 304.

[56] *Id.*

[57] 377 F. Supp. 613 (D.P.R. 1974).

[58] *Id.* at 624.

[59] *Id.* at 623-24.

[60] *Id.* at 623.

[61] *See* Blaskey, *University Students' Right to Retain Counsel for Disciplinary Proceedings*, 24 CAL. W.L. REV. 65, 67-68 (1988).

[62] Most recently, in Gorman v. University of R.I., 646 F. Supp. 799 (D.R.I. 1986), *modified*, 837 F.2d 7 (1st Cir. 1988), a student was denied the assistance of counsel in a university disciplinary proceeding because there were no criminal charges stemming from the incident in question. 646 F. Supp. at 806, 837 F.2d at 16. In so holding, neither the district court nor the First Circuit Court of Appeals even cited *Marin* in their discussions of students' right to counsel. *Id.* The holding in *Gorman* is no surprise; for several years the rule in the First Circuit has been that students have a right to counsel only when facing criminal charges arising out of the same set of facts as the disciplinary proceedings. *See* Gabrilowitz v. Newman, 582 F.2d 100 (1st Cir. 1978); McLaughlin v. Massachusetts Maritime Academy, 564 F. Supp. 809 (D. Mass. 1983). For a discussion of *Gabrilowitz*, *McLaughlin*, and students' right to counsel when facing both criminal and disciplinary charges, see *infra* notes 83-107 and accompanying text.

[63] It is difficult to determine how Blaskey would fit *Marin* into the general framework surrounding students' due process rights, including students' right to the assistance of counsel because Blaskey omits a discussion of several significant cases involving or

### B. *Is Today's Due Process Fair Process?*

Today's version of disciplinary due process, that is, notice to students of the charges against them and an opportunity to be heard, is sometimes criticized as unfair to students.[64] Most criticism centers on courts' presumption that student affairs administrators are impartial when making disciplinary decisions.[65] As one author stated, "Any administrator who initially decides a student should be charged naturally has a predisposition to find him guilty of that charge."[66] In many cases involving significant disciplinary matters, such as suspension or expulsion, however, the administrator initiating the action is not the sole decisionmaker; rather, some type of committee or judicial board bears ultimate responsibility.[67] Even when the charging administrator has the power to suspend or expel, there is usually some appeals process by which the charging administrator's judgment may be checked.[68]

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establishing circumstances in which students are entitled to the assistance of counsel. Among these cases are French v. Bashful, 303 F. Supp. 1333 (E.D. La. 1969), *appeal dismissed*, 425 F.2d 182 (5th Cir. 1970), *cert. denied*, 400 U.S. 941, 91 S. Ct. 232 (1970); Gabrilowitz v. Newman, 582 F.2d 100 (1st Cir. 1978); McLaughlin v. Massachusetts Maritime Academy, 564 F. Supp. 809 (D. Mass. 1983); Henson v. Honor Comm. of Univ. of Va., 719 F.2d 69 (4th Cir. 1983); University of Houston v. Sabeti, 676 S.W.2d 685 (Tex. Ct. App. 1984); and Gorman v. University of R.I., 646 F. Supp. 799 (D.R.I. 1986), *modified*, 837 F.2d 7 (1st Cir. 1988). *See* Blaskey, *supra* note 61, at 75-82.

Blaskey further mischaracterizes the university disciplinary process. He suggests that university disciplinary hearings are the equivalent of criminal trials or hearings because formal charges are brought, witnesses testify, and cross-examinations may be conducted. *See* Blaskey, *supra* note 61, at 82. This superficial analogy is directly contrary to the manner in which courts and most commentators view the disciplinary process. It ignores institutions' strong interests in the promulgation of disciplinary rules and procedures, and the educational nature of many disciplinary proceedings.

[64] *See* Note, *supra* note 39. Interestingly, James M. Picozzi, the author of the Note, was a defendant in a disciplinary case while a law student at the University of Michigan. *See* Picozzi v. Sandalow, 623 F. Supp. 1571 (E.D. Mich. 1986). Picozzi's article reflects a bias against the current interpretation of educational due process and, indeed, he admits his bias in a footnote.

[65] "[C]ourts presume good faith on the part of school administrators—but why they do so is unclear." Note, *supra* note 39, at 2140.

[66] *Id.* at 2142.

[67] *See* Golden, *Procedural Due Process for Students at Public Colleges and Universities*, 11 J.L. & EDUC. 337, 359 (1982) ("Hearing panels appear to be more widely used than hearing officers in general.").

Admittedly, in many situations the student affairs administrator initiating disciplinary action also decides the student's punishment. However, these cases usually involve the imposition of relatively minor disciplinary sanctions, such as probation, or the mere delivery of "Dutch Uncle talks." Such encounters are valuable teaching and counseling opportunities, no one can reasonably suggest that individual administrators should be denied this discretion.

[68] *Id.*

## IV. THE RIGHT TO COUNSEL

The assistance of counsel was not cited in *Dixon* as a requirement of due process. Some courts have relied on that omission to support the position that the right to counsel is not a required safeguard in university disciplinary proceedings.[69] Courts have declined to recognize a right to counsel for a variety of other reasons. These include the beliefs that disciplinary proceedings are not judicial in nature and should be kept informal, that literate and educated students should be able to defend themselves, and that courts should not interfere with colleges' rights to determine their own disciplinary procedures.[70]

The Supreme Court has not been called upon to decide whether students have a right to counsel in university disciplinary proceedings. The Court came closest to addressing the issue in *Goss v. Lopez*.[71] In *Goss*, students at a public high school were arbitrarily suspended for ten days for their roles in a lunchroom disturbance. The Court ruled that the students were entitled to "fundamentally fair" disciplinary procedures, including notice and a hearing.[72] The failure by the school to provide these violated the students' right to due process. *Dixon* had set out essentially the same requirements fourteen years earlier. On the issue of students' right to counsel, the Court stated, "[W]e stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the students the opportunity to secure counsel. . . ."[73] The Supreme Court never reached the issue of whether the assistance of counsel might be required when students face lengthy suspensions or expulsion. Instead it limited its ruling to short suspensions of ten days or less.[74]

*Goss* resulted in a recognized lack of binding precedent regarding students' right to counsel. Such right to counsel is thus determined in other courts, both state and federal. As might be expected, the courts' decisions have varied. From this gray area two situations have emerged in which courts allow students to be assisted by attorneys. First, students are entitled to the assistance of counsel when the university proceeds through counsel. Second, students may be assisted by counsel when they face criminal charges arising out of the same set of facts that led to the university disciplinary charges.

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[69] *See, e.g.*, Barker v. Hardway, 283 F. Supp. 228 (S.D. W.Va. 1968), *aff'd*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905, 89 S. Ct. 1009 (1969); Haynes v. Dallas County Junior College Dist., 386 F. Supp. 208 (N.D. Tex. 1974).

[70] *See* Comment, *Constitutional Law—Procedural Due Process—Student Has Right to Have Attorney Present at University Disciplinary Hearing When Criminal Charges Are Pending*, 1978 B.Y.U. L. REV. 722, 725; *see also* Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1252 (E.D. Mich. 1984), *aff'd*, 787 F.2d 590 (no right to counsel where disciplinary proceedings not complex, and student had opportunity to discuss case with administrator prior to hearing).

[71] 419 U.S. 565, 95 S. Ct. 729 (1975).

[72] *Id.* at 568, 95 S. Ct. at 732.

[73] *Id.* at 568, 95 S. Ct. at 740.

[74] *Id.*, 95 S. Ct. at 741.

### A. *When the Institution Proceeds Through Counsel*

If an institution employs counsel in disciplinary proceedings, the students charged are entitled to the assistance of counsel. This proposition is based primarily on *French v. Bashful*.[75]

In *French*, the plaintiffs, students at Southern University in New Orleans, were suspended or expelled by the University's disciplinary committee because of their roles in campus demonstrations. The committee denied the plaintiffs' request to be assisted by counsel at their hearing. Although the court believed that the students received a fair hearing,[76] and were afforded the protections mandated by *Dixon*,[77] it nonetheless held that the students were denied due process when they were not allowed to have their attorneys assist them at the hearing.

The reason for the court's decision was Southern's use of a third-year law student to prosecute the cases. Although the law student was not a lawyer at the time of the proceedings, the court believed that his ability to conduct himself appropriately in such surroundings was far superior to that of the students.[78] In fact, a member of the disciplinary committee testified that the law student "was chosen to prosecute these cases because of his familiarity with legal proceedings."[79] Thus, the plaintiffs had lost an extremely valuable right—a college education—when placed at a disadvantage that could be overcome by the assistance of counsel. The court ordered the University to hold new hearings for the students, at which time they would have the right to be assisted by their retained counsel.[80]

Although *French* was not the first case to address students' right to counsel when a university proceeds through counsel,[81] few, if any, similar cases have arisen subsequently. This is probably attributable to the fact that few colleges or universities use attorneys or law students to prosecute student disciplinary cases. Courts have yet to consider

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[75] 303 F. Supp. 1333 (E.D. La. 1969), *appeal dismissed*, 425 F.2d 182 (5th Cir.), *cert. denied*, 400 U.S. 941, 91 S. Ct. 232 (1970).

[76] "[W]e are of the opinion that for the most part the hearings were conducted in a fair and impartial manner." 303 F. Supp. at 1336.

[77] "The students were given advance notice of the hearings and of the charges against them. They were permitted to call their own witnesses and to cross-examine the witnesses who testified against them—a procedural right which the [c]ourt in *Dixon* said does not have to be afforded to them." *Id.*

[78] *Id.* at 1338.

[79] *Id.* at 1337.

[80] *Id.* at 1339. There may be some question as to what extent the court anticipated the students' attorneys being able to assist them. The court used the term "representation," implying that the students' attorneys would be able to actually participate in the hearing. At the same time, the court implied that the University could restrict counsel's role by prohibiting cross-examination by counsel. *See id.* at 1337. This ambiguity was never clarified.

[81] *See* Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967) ("Where the proceeding is non-criminal . . . and the government does not proceed through counsel . . . due process does not require representation by counsel.").

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cases in which a university's use of counsel is more subtle, such as those in which an attorney instructs an administrator on presenting a case against a student.[82]

### B. *When Criminal Charges are Pending*

Special concerns arise when students face disciplinary action for incidents which are also violations of the law. In these cases, students' statements may lead to criminal convictions as well as institutional penalties, since students risk incriminating themselves in university disciplinary hearings. The magnitude of the risk depends on the timing of the university hearings.[83] When students have been criminally tried and verdicts have been returned prior to university hearings, the risks are minimal. If students are criminally tried and are acquitted, the double jeopardy doctrine will generally shield them from a second criminal prosecution based on incriminating disciplinary hearings.[84] If students are convicted, erroneous or incriminating findings of fact in disciplinary hearings are irrelevant.[85]

On the other hand, when students have been criminally charged, but not tried or when students have yet to be charged prior to the university disciplinary hearings, the risks are enormous. Under such circumstances, students face difficult choices. Students who actively defend themselves in disciplinary hearings may incriminate themselves and expose the strengths and weaknesses of their cases to attentive criminal prosecutors.[86] When criminal charges have yet to be filed, students' performances at hearings may determine whether they will be charged.[87] The students' only other choice, a meager one, may be to avoid contesting the disciplinary charges, thereby aiding their criminal defense, but simultaneously ensuring their suspension or expulsion.[88]

In *Gabrilowitz v. Newman*,[89] the First Circuit Court of Appeals addressed whether a student has a right to counsel in disciplinary proceedings when a criminal trial is pending. The student, Steven A. Gabrilowitz, a senior at the University of Rhode Island (U.R.I.), was charged with assault with intent to commit rape on another student.

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[82] *See* Frey, *The Right of Counsel in Student Disciplinary Hearings*, 5 VAL. U.L. REV. 48, 54, 55-59 (1970). Although Professor Frey made this observation almost two decades ago, it remains true today.

[83] See Note, *supra* note 39, at 2152.

[84] See, e.g., United States v. Scott, 437 U.S. 82, 91, 98 S. Ct. 2187, 2194 (1978) ("A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution . . . .").

[85] See Note, *supra* note 39, at 2152.

[86] *Id.* at 2153.

[87] *Id.*

[88] Less than one fourth of the public institutions responding to a national survey indicated that they allow students to remain silent in disciplinary proceedings without negative inferences being drawn. See Golden, *supra* note 67, at 345-59.

[89] 582 F.2d 100 (1st Cir. 1978).

While Gabrilowitz was at the police station being charged, he was suspended by the University. He was subsequently directed to appear before U.R.I.'s student conduct board and defend himself against specific allegations of assault with intent to commit rape. The student conduct board's rules of procedure prohibited the presence of legal counsel at hearings. Gabrilowitz sought an injunction, asking that he be allowed the assistance of counsel; the district court issued the injunction. The First Circuit Court of Appeals affirmed the district court's decision.

In considering the case, the court acknowledged that most courts did not recognize a right to counsel in university disciplinary hearings, but noted that those cases did not involve "the specter of a criminal case hovering over the hearing."[90] The court found that Gabrilowitz would be deprived of due process if, without the assistance of counsel, he were forced to choose between the risk of expulsion and the risk of self-incrimination at the hearing.[91] The court conceded that the presence of counsel would not remove all the risks, but would enable Gabrilowitz to make an intelligent and informed choice between the risks presented.[92] Of critical note, the court restricted the role of counsel to advising the student, and excluded counsel from actual participation in the hearing.[93]

Just two years later, in *Boyle v. Newman*,[94] the University of Rhode Island returned to court, this time in a state court. In *Boyle*, three students were charged, both criminally and by the University, with sexual assault—a virtual repeat of *Gabrilowitz*. Although U.R.I. acknowledged that it should allow the students' attorneys to assist them at their hearing, it sought to prevent the attorneys from cross-examining the University's witnesses. Ultimately, the Rhode Island Superior Court[95] ruled that U.R.I. need not allow cross-examination by counsel.[96]

In *McLaughlin v. Massachusetts Maritime Academy*,[97] students' right to the assistance of counsel when facing criminal charges was reaffirmed. The plaintiff, a cadet at the Academy, was arrested off-campus for the possession of drugs. He was later charged for the same incident by the school's disciplinary board. His request that his attorney be present at his hearing was denied by the board. He then sought injunctive relief, requiring the Academy to allow him the assistance of counsel. In granting the injunction, the district court simply followed the precedent established by *Gabrilowitz*.[98]

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[90] *Id.* at 104.

[91] *Id.* at 103-04.

[92] *Id.* at 106.

[93] *Id.*

[94] No. 79-335 (Ct. App. R.I. 1980).

[95] Superior Courts in Rhode Island are the state's trial courts.

[96] *See* Note, *supra* note 39, at 2148-49.

[97] 564 F. Supp. 809 (D. Mass. 1983).

[98] *Id.* at 812-13.

Similarly, in *Hart v. Ferris State College*,[99] the court again held that students have a right to counsel when facing both criminal and disciplinary charges stemming from the same incident. In *Hart*, the plaintiff sought to enjoin the College from holding her disciplinary hearing until the criminal matter was resolved. The district attorney had announced his intention to subpoena the disciplinary hearing transcripts for use in the plaintiff's criminal trial. Among other things, the plaintiff asserted that she would be denied due process were her attorney not allowed to cross-examine the witnesses against her. The court denied the injunction, believing that the student's right to consult with counsel and to have counsel make a statement for her, as provided by the College's disciplinary procedures, afforded adequate protection.[100] In so holding, the court relied heavily on *Gabrilowitz*.[101]

It is interesting to note that *Gabrilowitz* and *McLaughlin* did not discuss several alternative means of protecting the students' rights. For example, the courts might have stayed the disciplinary proceedings until the criminal trials were completed. The courts could have fashioned an exclusionary rule, holding that if the university disciplinary proceedings preceded the disposition of criminal charges arising out of the same alleged misconduct, the students' testimony in the hearing would be inadmissible in later criminal trials.[102] The courts' decisions not to stay the disciplinary proceedings can probably be traced to a reluctance to interfere significantly with schools' legitimate interests in resolving student disciplinary problems.[103] The limited role of counsel allowed was viewed by the courts as only slightly intrusive, and seemed to place no administrative or financial burden on the universities.[104] Further, allowing students the assistance of counsel was simply easier than fashioning a new exclusionary rule, especially when some case law already recognized the right to counsel in disciplinary proceedings.[105] The *Hart* court did discuss the student's option to remain silent during her hearing since in the College's disciplinary procedure, her silence could not be used against her.[106] The court rejected that option, however, because it did not allow the student to "control the direction of the current of her hearing."[107]

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[99] 557 F. Supp. 1379 (W.D. Mich. 1983).

[100] *Id.* at 1385-88.

[101] *See id.* at 1386-88.

[102] *See* Comment, *supra* note 70, at 736-37.

[103] *See* Gabrilowitz v. Newman, 582 F.2d 100, 106 (1st Cir. 1978).

[104] *See id.*; McLaughlin v. Massachusetts Maritime Academy, 564 F. Supp. 809, 812 (D. Mass. 1983).

[105] *See Gabrilowitz*, 582 F.2d at 104. The court cited Mills v. Board of Educ. of the Dist. of Colum., 348 F. Supp. 866 (D.D.C. 1972), Givens v. Poe, 346 F. Supp. 202 (W.D. N.C. 1972), and Esteban v. Central Mo. State College, 277 F. Supp. 649 (W.D. Mo. 1967), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965, 90 S. Ct. 2169 (1970) (holding that due process includes the right to counsel in student expulsion proceedings).

[106] *Hart*, 557 F. Supp. at 1385.

[107] *Id.* at 1385 (quoting *Gabrilowitz*, 582 F.2d at 104).

## V. ACADEMIC VERSUS DISCIPLINARY DECISIONS: A STUDENT RIGHTS DICHOTOMY?

Students may face suspension or dismissal for reasons other than the violation of university rules, misconduct, or more serious matters, such as the commission of crimes. Students are often required to leave universities because of academic failure or academic misconduct, such as cheating and plagiarism. Although the outcome is the same whether a student is expelled for the commission of a crime or for academic deficiencies, courts view the two quite differently.

### A. *Due Process in the Academic Context*

In *Board of Curators of the University of Missouri v. Horowitz*,[108] the Supreme Court assessed students' due process rights in wholly academic proceedings. In so doing, the Court followed the traditional rule of judicial deference to academic expertise in the educational process.[109]

Charlotte Horowitz, a medical student, was dismissed for deficiencies in clinical performance, peer and patient relations, and personal hygiene. After faculty members repeatedly expressed dissatisfaction with her clinical work she was advanced to her final year on academic probation. Her poor clinical evaluations continued, and the school's council on evaluation postponed her graduation and recommended that she be dismissed, absent "radical improvement."[110] She was then allowed to take a special set of oral and practical tests, administered by practicing physicians in the area, as a means of appealing the council's decision. After receiving unfavorable reports from the physicians, the council reaffirmed its recommendation. At the end of the academic year, and after further negative reports on her clinical work, the council recommended her dismissal from the University. The school's coordinating committee, the dean, and ultimately the provost for health sciences affirmed the decision.

In holding that Horowitz's due process rights were not abridged, the Court stated:

> [She] has been awarded at least as much due process as the Fourteenth Amendment requires. The school fully informed [her] of the faculty's dissatisfaction with her clinical progress and the danger that this posed to timely graduation and continued enrollment. The ultimate decision to dismiss [her] was careful and deliberate. These procedures were sufficient under the Due Process Clause of the Fourteenth Amendment.[111]

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[108] 435 U.S. 78, 98 S. Ct. 948 (1978).

[109] See Note, Board of Curators of the University of Missouri v. Horowitz: *Student Due Process Rights and Judicial Deference to Academic Dismissals*, 15 WILLAMETTE L. REV. 577 (1979).

[110] *Horowitz*, 435 U.S. at 97, 98 S. Ct. at 959.

[111] *Id.* at 85, 98 S. Ct. at 952.

The Court also observed that the University went beyond the constitutionally-required due process by allowing Horowitz to be examined by independent physicians, thereby making certain that its assessment of her skills was correct.[112] So long as academic administrators make the decision to expel a student "carefully and deliberately," then, the student has received sufficient due process.

Judicial deference to academic decisions continues today. In *Regents of University of Michigan v. Ewing*,[113] a case involving the alleged infringement of a student's substantive[114] rather than procedural due process rights, the Supreme Court upheld the dismissal of a student with a history of low grades and poor exam scores in a medical program. The Court observed that when asked to review genuinely academic decisions, judges should show great respect for the faculty's professional judgment.[115] Further, the Court reasoned that courts may not override academic judgments unless they are "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."[116]

The extent to which judicial deference to administrators' and professors' judgment impairs students' due process rights in wholly academic proceedings probably depends on the facts of the particular case. In *Horowitz*, for example, if one considers the examinations administered by independent practicing physicians to be the equivalent of a hearing before an impartial tribunal, Charlotte Horowitz received due process equal to or greater than that to which she would have been entitled had the *Dixon* requirements been the prevailing standard.[117] The problem, of course, is that the sweeping discretion granted by the Court to universities in academic proceedings provides great potential for abuse.

### B. *Academic Misconduct as Compared to Academic Competence: Due Process and the Right to Counsel*

*Horowitz* involved a university's expertise and judgment in evaluating the academic competence of a student. The Supreme Court distinguished that situation from cases in which students face disciplinary charges stemming from violations of rules of conduct.[118] The implication of *Horowitz* is that students charged with acts of academic misconduct (as compared with academic competence), such as cheating or plagiarism, should be afforded greater procedural protection. Courts appar-

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[112] *Id.*

[113] 474 U.S. 214, 106 S. Ct. 507 (1985).

[114] Substantive due process refers to constitutional limitations on the content of state action. See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 430 (2d ed. 1983).

[115] *See Ewing*, 474 U.S. at 225, 106 S. Ct. at 513.

[116] *Id.*

[117] Ms. Horowitz was clearly given notice of her deficiencies.

[118] *Horowitz*, 435 U.S. at 86, 98 S. Ct. at 953.

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ently treat academic misconduct in the same manner as disciplinary misconduct, holding that students who receive notice of the charges against them and a hearing have received due process.[119]

Courts' treatment of academic and disciplinary misconduct also appears equal with regard to students' right to counsel. In *University of Houston v. Sabeti*,[120] a student suspended for cheating alleged that he was denied due process when his attorney was not allowed to question and cross-examine witnesses at his hearing. Noting that the student was not entitled to the assistance of counsel in the first place,[121] the court held that counsel's role was properly limited to advising the plaintiff.[122] The latter determination was completely in line with *Gabrilowitz v. Newman*, limiting counsel to an advisory role.

In *Henson v. Honor Committee of University of Virginia*,[123] a law student was suspended by the University after the law school's honor committee found him guilty of cheating. He alleged that he was denied due process when his attorney was not allowed to conduct his defense. The student was assisted by two law students, who consulted extensively with his attorney.[124] The honor committee was comprised of law students. Although the court did not expressly state that the student had a right to counsel under the circumstances, it implicitly recognized the right.[125] Thus, *Henson* is much like *French v. Bashful*,[126] which held that students have a right to counsel in disciplinary hearings in which universities proceed through counsel. In *Henson*, the University of Virginia effectively proceeded through counsel by allowing a group of law students to administer its law school's disciplinary system.

A comparison of students' due process rights, including the right to counsel, in disciplinary cases with such rights in academic competence cases indeed presents a dichotomy. Students in academic competence cases have severely restricted rights; so long as administrators exercise "professional judgment" when making their decisions, students who are suspended or expelled have received all the process they are due. At the opposite end of the spectrum are students charged with disciplinary misconduct; they are entitled to notice of the charges against them, an opportunity to be heard and, under some circumstances, the assistance of counsel. Disciplinary and academic misconduct cases, however, are quite similar.[127] In both instances students apparently have a right to counsel when universities proceed through counsel, and such counsel is generally limited to advisory roles. In this light, the academic-disciplinary dichotomy disappears.[128]

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[119] See, e.g., Henson v. Honor Comm. of Univ. of Va., 719 F.2d 69 (4th Cir. 1983); University of Houston v. Sabeti, 676 S.W.2d 685 (Tex. Ct. App. 1984); Hall v. Medical College of Ohio, 742 F.2d 299 (6th Cir. 1984).

[120] 676 S.W.2d 685 (Tex. Ct. App. 1984).

[121] *Id.* at 687-88 (citing Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961); Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729 (1975)).

[122] 676 S.W.2d at 687-88.

[123] 719 F.2d 69 (4th Cir. 1983).

[124] *Id.* at 74.

[125] *Id.* at 73-75.

[126] 303 F. Supp. 1333 (E.D. La. 1979), *appeal dismissed*, 425 F.2d 182 (5th Cir.), *cert. denied*, 400 U.S. 941, 91 S. Ct. 232 (1970), *supra* notes 63, 75-80, *infra* note 159 and accompanying text.

## VI. PUBLIC VERSUS PRIVATE INSTITUTIONS

The overwhelming majority of cases involving students' due process rights, among them the right to counsel, have involved public universities.[129] This is because, as agencies of the state, public universities' actions are "state actions," subject to fourteenth amendment limitations.[130] As a rule, constitutional guarantees of due process do not bind private universities, unless plaintiffs can somehow bring the imposition of sanctions within the scope of state action.[131]

### A. *State Action: A Jurisdictional Barrier*

Historically, plaintiffs at private universities have attempted to demonstrate state action on the part of institutions by applying either "public function" or "government contacts" theories.[132] According to the public function theory, when a private school performs a function generally considered to be a responsibility of the government, such as providing citizens of a state with higher education, its actions may be considered state actions.[133] The government contacts theory holds that when a private college obtains substantial resources from the government, its actions amount to state actions.[134] Although plaintiffs met with some success under both theories,[135] victories were rare. This was due in large part to the vagueness of what exactly constituted state action, and the reluctance of courts to intervene.[136]

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[127] *See, e.g.*, Nash v. Auburn Univ., 621 F. Supp. 948, 957 (M.D. Ala. 1985) (no right to counsel in academic misconduct case when no criminal charges are pending and the University does not proceed through counsel).

[128] A discussion of a student's right to counsel when facing impending criminal charges arising out of the same set of facts that gave rise to the academic charge (analogous to *Gabrilowitz*) has been purposely ignored. There is no authority upon which to base such a discussion, and it is difficult to imagine such a situation ever materializing.

[129] *See* Faccenda & Ross, *Constitutional and Statutory Regulation of Private Colleges and Universities*, 9 VAL. U.L. REV. 539, 540 (1975).

[130] *See supra* note 38.

[131] W. KAPLIN, *supra* note 53, at 312.

[132] *Id.* at 18.

[133] *Id.*

[134] *Id.*

[135] *See, e.g.*, Buckton v. NCAA, 366 F. Supp. 1152 (D. Mass. 1973), in which it is stated:

> [Boston University], though a private institution, clearly performs functions governmental in nature, such as providing higher education to and exercising substantial dominion over its students. . . . Moreover, state support to these defendants "through any arrangement, funds, or property," would inject state action into their conduct.

*Id.* at 1156.

In recent years both the public function and government contacts theories for establishing state action have been rejected. The Supreme Court expressly rejected the government contacts theory in 1982[137] and the public function theory was eliminated by a series of district and circuit court opinions.[138] In an attempt to clarify the state action doctrine, the Supreme Court, in *Lugar v. Edmonson Oil Co.*,[139] established a two-part test to determine if a private entity's actions were state actions:

> First the deprivation must be caused by the exercise of some right or privilege created by the state or a rule of conduct imposed by the state or by a person for whom the state is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state.[140]

Applying the *Lugar* test in *Albert v. Carovano*,[141] the Second Circuit Court of Appeals held the actions of Hamilton College, a private institution, to be state actions. Because the College was chartered by the State of New York, it was required to adopt rules and regulations for the maintenance of public order on campus pursuant to the New York Education Laws.[142] Two students who were suspended by the College under the adopted regulations challenged their suspension on due process grounds. The court found that the first part of the *Lugar* test was met by the College because faculty members and administrators testified that Hamilton would never have adopted the regulations had it not been required to do so by the state.[143] The second part of the test was met because the Hamilton College personnel charged with enforcing the regulation did so as the result of "significant state encouragement," thereby making their conduct "otherwise chargeable to the state."[144]

When private colleges enact rules and regulations required by state law, then, *Carovano* makes it clear that students charged with violations of those rules and regulations must be afforded due process. If those violations are also criminal offenses, or if the colleges proceed through counsel in their enforcement, due process would include the right to counsel. The implications of this new standard will most likely be felt in disciplinary actions resulting from hazing incidents. Several states have passed laws requiring private colleges to adopt anti-hazing policies and means for their enforcement.[145] Absent state laws or administrative regulations applicable to student conduct at private colleges and universities, state action, as specified by *Lugar*, seems unlikely to be found.[146]

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[136] Faccenda & Ross, *supra* note 129, at 543.

[137] Rendell-Baker v. Kohn, 457 U.S. 830, 102 S. Ct. 2764 (1982) (private school's receipt of public funds did not make its discharge decisions state actions even though virtually all of the school's income was derived from government funding).

[138] *See* Young, *The Student/Institutional Relationship: A Legal Update*, RISK MANAGEMENT AND THE STUDENT AFFAIRS PROFESSIONAL 17 (H. Owens ed. 1984).

[139] 457 U.S. 922, 102 S. Ct. 2744 (1982).

[140] *Id.* at 937, 102 S. Ct. at 2753-54.

[141] 824 F.2d 1333 (2d Cir. 1987).

[142] *Id.* at 1336-37.

[143] *Id.* at 1340.

[144] *Id.* at 1341.

### B. *Cracks in the Barrier*

Students at private universities who are unable to prove state action by their institutions are not necessarily unprotected. For years courts have chipped away at the state action barrier. As a result, students may have a right to counsel at private colleges and universities.

Courts have most often enforced students' rights by requiring private universities to abide by fair and reasonable disciplinary procedures. This is often based in part on universities' violation of their own disciplinary procedures, and is a hybrid of traditional contract law protections and constitutional limitations applied regardless of the absence of state action. In one of the earliest cases in this line, *Ryan v. Hofstra University*,[147] the plaintiff was expelled by the University in violation of its own disciplinary procedures. Ordering the plaintiff reinstated, the court ruled that "Hofstra University, though termed a 'private university', cannot expel, bar, and fine a student without following fair and reasonable procedures . . . . It must abide by Constitutional principles of fair conduct implicit in our society."[148] The court based its decision on its concept of justice as a basic societal expectation, one which should not be affected by a questionable distinction between public and private actors. Similarly, in *Kwiatkowski v. Ithaca College*,[149] another New York court found it "imperative that the college or university's decision to discipline [students] be predicated on procedures which are fair and reasonable."[150] The notion that private universities should recognize their students' constitutional rights out of "fairness" was embraced by some members of the academic community even before *Ryan* and *Kwiatkowski*,[151] and appears to have gained wider acceptance since.

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[145] See, e.g., the following state statutes: ME. REV. STAT. ANN. tit. 20-A, § 10004 (1987); MASS. GEN. L. ch. 269, §§ 17-19 (1987); MO. REV. STAT. §§ 578.360-365 (1987); N.C. GEN. STAT. §§ 14-35, -36, -38 (1986); 24 PA. CONS. STAT. §§ 5352-54 (1987).

Further, hazing and the harm resulting from it are particularly likely to result in criminal charges being filed against participants, who also face university disciplinary charges, circumstances under which students at public universities are entitled to the assistance of counsel.

[146] See, e.g., Kusnir v. Leach, 439 A.2d 223 (Pa. Commw. Ct. 1982). In *Kusnir*, the court required Clarion State College, as a Commonwealth agency, to adhere to Pennsylvania's administrative laws. As a result, the College had to allow a student to be assisted by counsel at his disciplinary hearing. Although the College in *Kusnir* was a state institution, the effect that the state's administrative regulations, and not the statutes, had on the College's disciplinary process remains illustrative.

[147] 324 N.Y.S.2d 964 (N.Y. Sup. Ct. 1971).

[148] *Id.* at 968.

[149] 368 N.Y.S.2d 973 (N.Y. Sup. Ct. 1975).

Finally, some courts are not sure whether to distinguish between public and private universities. *Slaughter v. Brigham Young University*[152] involved the expulsion of a student for academic misconduct. In upholding the student's dismissal, the court assessed whether the University's action was arbitrary in light of the adequacy of the procedure, and the substantiality of the evidence upon which the University relied.[153] In reviewing the procedure, the court used constitutional due process as a guide, ruling:

> We hold that these proceedings met the requirements of the Constitutional due process doctrine as it is presently applied to public universities. It is not necessary under these circumstances to draw any distinction, *if there be any*, between the requirements in this regard for public and private institutions (emphasis added).[154]

Although the doctrinal bases for procedural rights may differ between public and private colleges, and most courts continue to afford private institutions greater flexibility, the law appears to be moving toward a similarity of treatment.[155] Thus, administrators at private universities should recognize that their students may enjoy a right to counsel under the same circumstances as students at public universities.

## VII. Peripheral Issues Related to the Right to Counsel

In criminal cases, defendants' right to counsel attaches at the initiation of formal adversarial judicial proceedings,[156] although no right to counsel applies unless defendants are actually incarcerated as a result of the prosecution.[157] Generally, defendants must be informed of their right to counsel and, if they cannot afford attorneys, counsel will be appointed for them. Must students who are entitled to the assistance of counsel be informed of that right? If students have a right to counsel, but cannot afford attorneys, must universities hire attorneys for them? The answers are: perhaps and no.

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[150] *Id.* at 977.

[151] *See* Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1036 (1969) ("[I]t seems to me unthinkable that the faculty and administration of any private institution would consider recognizing fewer rights in their students than the minimum the Constitution exacts of the state universities.").

[152] 514 F.2d 622 (10th Cir. 1975).

[153] *Id.* at 625.

[154] *Id.*

[155] W. KAPLIN, *supra* note 53, at 294.

[156] Kirby v. Illinois, 406 U.S. 682, 688, 92 S. Ct. 1877, 1882 (1972).

[157] Scott v. Illinois, 440 U.S. 367, 373-74, 99 S. Ct. 1158, 1165 (1979).

University disciplinary proceedings are not analogous to criminal trials.[158] Thus, many constitutional protections inherent in criminal procedure are inapplicable to the university disciplinary process. In *French v. Bashful*, the first student discipline case to address the issue of appointed counsel, the court, in dictum, opposed appointed counsel:

> When the right to retain counsel is involved, we feel that any burden which such a right places on the university is inconsequential. . . . But a similar holding as to appointed counsel would have a far greater effect on the university. If a college administration were forced to provide counsel for defendant students . . . the cost to the school would be considerable. It is no secret that universities are not unlimited in their funds. It is therefore this Court's opinion that this would be too high a price for a college to pay for the privilege of enforcing discipline among its students.[159]

No cases have been decided since *French* which suggest that universities must provide indigent students with counsel. What was once dictum in *French* has apparently become the rule.

Whether universities must advise students of their right to counsel when appropriate is less clear. It is important to note that so advising students places little or no administrative or financial burden on universities. Balancing that light burden with students' vital interests in the assistance of counsel, courts might conclude that colleges must inform students of their right to counsel.[160] Further, by advising students of their rights, university administrators might avoid litigation when students who should have been assisted by counsel, but were not, seek remedies. Indeed, informing students of their right to counsel seems both reasonable and prudent.

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[158] *See generally* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961) (full-dress judicial hearing with the right to cross-examine witnesses not required); Gorman v. University of R.I., 837 F.2d 14 (1st Cir. 1988) ("[T]he question presented is whether . . . the individual has had an opportunity to answer, explain, and defend, and not whether the hearing mirrored a common law criminal trial.").

[159] 303 F. Supp. 1333, 1338 (E.D. La. 1969).

[160] The use of a balancing test to determine whether procedural due process requirements have been satisfied is routine. The Supreme Court, in Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893 (1976), established a framework for analyzing procedural due process cases. In *Mathews*, the court required consideration, or a balancing, of three factors: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of the interest . . . and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved, and the fiscal administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 335.

For an application of the *Mathews* balancing test in a university disciplinary proceeding, see Hart v. Ferris State College, 557 F. Supp. 1379, 1387-88 (W.D. Mich. 1983); *see also* Golden, *College Student Dismissals and the Eldridge Factors: What Process is Due?*, 8 J.C.U.L. 495 (1981-82).

## VIII. SOME THOUGHTS ON THE RIGHT TO COUNSEL

The current judicial concepts of due process on campus and students' right to counsel create an interesting blend of respect for universities' interest in maintaining discipline, concern for universities' administrative and financial resources, and a desire to protect students' rights. "The system" relies in large part on the integrity of individual university administrators for the protection of students' rights. For the most part this confidence appears well-placed and, as a practical matter, students seldom need (or want) the assistance of counsel in disciplinary proceedings.[161]

Students' right to counsel has been at issue only when individual administrators have exercised questionable judgment and trampled on students' rights. One has to wonder why, for example, the University of Rhode Island in *Gabrilowitz* and *Boyle* did not allow cross-examination by defense counsel. Even if cross-examination would have greatly extended hearing time or made University witnesses uncomfortable, these would seem to be light administrative burdens to a University seeking the truth.[162] This is even more apparent when the charge is a serious one, such as rape. For that matter, why, in *Gabrilowitz*, did U.R.I. not allow Steven Gabrilowitz to be assisted by counsel in the first place? Student affairs administrators should have students' best interests at heart, and "no . . . administrator can believe that when students face impending criminal charges . . . those students should be forced to weigh the risks between institutional punishment and self-incrimination without the [assistance] of counsel."[163] In most cases, universities incur far greater administrative and financial burdens[164] by contesting students' right to counsel than they would if they allowed attorneys' participation.[165] In situations such as those in *Gabrilowitz*, *Boyle*, and *McLaughlin*, the universities could have saved themselves time and expense through the promulgation of simple policies postponing university disciplinary proceedings until the resolution of related criminal matters.[166] In short, students' right to counsel should not be the issue that universities often make it out to be.

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[161] This observation is based on the author's experience as a student affairs administrator at three colleges and universities.

[162] "Cross-examination has long been recognized as one of the best methods for determining truth, and a trained trial attorney is the best person to employ that method." Note, *supra* note 39, at 2149.

[163] D. Richmond, Due Process On Campus: Students' Right to Counsel 13-14 (manuscript accepted July, 1988, for publication by C. STUDENT AFFS. J.).

[164] For example, in Picozzi v. Sandalow, 623 F. Supp. 1571 (E.D. Mich. 1986), the University of Michigan spent approximately $100,000 litigating the plaintiff's due process rights. *See* Note, *supra* note 39, at 2150 n.86.

[165] *See id.* at 2149.

## CONCLUSION

Despite significant developments in the recognition of students' constitutional rights on college and university campuses, students' right to counsel in disciplinary proceedings remains very limited. Only when institutions proceed through counsel (or the equivalent thereof, such as law students), or students face impending criminal charges arising out of the same set of facts as do the disciplinary proceedings, are students entitled to the assistance of counsel. Even then, attorneys are usually allowed to function only as observers and advisors—not as advocates.

Whether students' right to counsel will soon evolve further is questionable. If students' right to counsel is broadened, it will probably be on a case-by-case basis. With no significant case law developments since *Gabrilowitz* in the late 1970's, a general expansion of students' right to counsel through allowing assistance by counsel at most suspension or expulsion proceedings seems improbable.

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[166] An example of such a policy may be found at the University of Kansas regarding violation of law and University discipline:

> If a violation of law occurs on campus and is also a violation of a published University regulation, the University may institute its own proceedings against an offender who has been subjected to civil prosecution only if the University interest involved is clearly distinct from that of the community outside the University. Ordinarily, the University should not impose sanctions if public prosecution of a student is anticipated or until law enforcement officials have disposed of the case.

THE UNIVERSITY OF KANSAS, YOU AND THE UNIVERSITY OF KANSAS, STUDENT HANDBOOK, 1988-89.

Suspension of students prior to the completion of college and university disciplinary proceedings ought to be acceptable if the students' continued presence on campus presents an imminent danger of physical harm. However, students must then be provided with hearings as soon as possible. See Note, *supra* note 39, at 2157-58.

## COMMENTARY

# JUDICIAL RESPONSES TO ADVERSE ACADEMIC DECISIONS AFFECTING PUBLIC POSTSECONDARY INSTITUTION STUDENTS SINCE "*HOROWITZ*" AND "*EWING*"*

by
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* *The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 110 Ed.Law Rep. [517]] (Aug. 22, 1996).*

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The purpose of this article is to analyze judicial responses to constitutional due process challenges relating to adverse academic decisions affecting public postsecondary students since *Board of Curators of the University of Missouri v. Horowitz*[1] and *Regents of the University of Michigan v. Ewing*.[2] The *Horowitz* and *Ewing* decisions defined the rights to due process in academic[3] matters on the public postsecondary campus. This study brings the law forward since the 1978 and 1995 Supreme Court decisions by identifying and analyzing fifty-nine cases that were on point.

### *Board of Curators of the University of Missouri v. Horowitz*

In August 1971 Charlotte Horowitz was admitted with advanced standing to the University of Missouri-Kansas City (UMKC) School of Medicine for a program

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[1] 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978).

[2] 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 [28 Ed.Law Rep. [720]] (1985).

[3] Disciplinary cases, including those involving cheating, are not reviewed here. Roberts noted, "A review of cheating cases indicates that most public universities officially treat cheating as a disciplinary [not academic] matter." Robert N. Roberts, *Public University Responses to Academic Dishonesty: Disciplinary or Academic*, 15 J.L. & Educ. 369, 370 (1986). See *McDonald v. Board of Trustees of the University of Illinois*, 375 F.Supp. 95 (S.D.Ill.1974); *University of Texas Medical School v. Than*, 874 S.W.2d 839 [90 Ed.Law Rep. [1263]] (Tex.Ct.App.1994); and *Gorman v. University of Rhode Island*, 837 F.2d 7 [43 Ed.Law Rep. [1310]] (1st Cir.1988).

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designed to prepare students to become competent, practicing physicians.[4] Horowitz began experiencing academic difficulty in spring 1972 as faculty members in the pediatrics course "criticized her lack of patient rapport and expertise in coming to the fundamentals of the clinical problem, erratic attendance, and poor personal hygiene.[5]

In the summer of 1972 the Council on Evaluation, a committee of students and faculty, reviewed all advance standing students including Horowitz.[6] The Council recommended that she not be advanced to year VI, the final year of the program. Horowitz received a letter outlining her deficiencies and informing her that she was on probation during year VI and "that noncompliance with certain standards of conduct is incompatible with continued progress and graduation."[7] Horowitz did not improve in the clinical setting and the University arranged to have seven independent physicians review her work and make recommendations to the Council on Evaluation.

After the review, the Council on Evaluation accepted the majority opinion of the physician panel that Horowitz not be allowed to graduate and forwarded the decision to the Coordinating Committee for approval. The Coordinating Committee accepted the recommendation and forwarded it to the Dean, who also approved the decision and informed Horowitz of this decision by letter.[8] At the end of May 1973, the Council on Evaluation met to reassess Horowitz's status and recommended that she be dropped from the school.[9] The Coordinating Committee accepted the recommendation and the Dean notified Horowitz that she was no longer a student. Horowitz unsuccessfully appealed the decision of the Dean to the Provost.

Horowitz then filed suit in the district court. The district court ruled in favor of the defendants and found that "[The] school went beyond the procedural due process [required] by affording plaintiff the opportunity to be examined by seven independent physicians in order to be absolutely certain that their grading of the plaintiff in her medical skills was correct."[10] She appealed to the Court of Appeals for the Eighth Circuit which reversed the district court and remanded with instructions that the UMKC Medical School provide Horowitz with a hearing before the decision making body.[11]

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[4] 538 F.2d 1317, 1318 (8th Cir.1976)

[5] *Id.* at 1319.

[6] *Horowitz*, 447 F.Supp. 1102, 1104 (W.D.Mo. 1975).

[7] *Horowitz*, 538 F.2d at 1319.

[8] *Id.*

[9] *Id.*

[10] *Id.*

The University petitioned for a writ of certiorari and the Supreme Court granted its petition. The Supreme Court did not rule directly on the issue of Horowitz having a liberty right, but *assumed* the existence of such a right, thus requiring procedural due process. The evidence showed that Horowitz had been given notice by the faculty and the Dean regarding her poor clinical performance on five separate occasions.[12]

Bringing its logic in *Goss* [13] from the K-12 setting to the collegiate setting, the Court chose not to formalize the academic dismissal process by requiring a hearing. The Court believed the differences between academic and disciplinary decisions called for "far less stringent procedural requirements in the case of an academic dismissal."[14] The Supreme Court noted:

> Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact-finding proceedings to which we have traditionally attached a full-hearing requirement. The decision to dismiss [Horowitz] . . . rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision.[15]

Thus, the Court required less stringent and formal procedures for academic matters and held that "a school is an academic institution, not a courtroom or administrative hearing room."[16] The Court "declined to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial

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[11] *Id.* at 1321.

[12] *Horowitz*, 435 U.S. at 85, 98 S.Ct. at 952.

[13] *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). The Court noted, "[F]urther formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process." *Id.* at 583, 95 S.Ct. at 740.

[14] *Id.* 435 U.S. at 89, 98 S.Ct. at 954.

[15] *Id.* at 89-90, 98 S.Ct. at 954-955.

[16] *Id.* at 88, 98 S.Ct. at 954.

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aspects of the faculty-student relationship."[17]

A majority of the justices ruled that the procedures leading to Horowitz's dismissal did not violate the Due Process Clause of the Fourteenth Amendment, and that "dismissals for academic [as opposed to disciplinary] cause do not necessitate a hearing before the school's decision-making body.[18]

### *Regents of the University of Michigan v. Ewing*

Seven years later, a second landmark decision involving academic due process and postsecondary students was made. In the fall of 1975 Scott Ewing entered the Interflex program at the University of Michigan, a six-year program where students earned both a bachelor's degree and a degree in medicine. His academic performance throughout the program was complicated by personal problems, inadequate preparation, poor grades, incompletes, and withdraws. After six years of being enrolled in the Interflex program, Ewing had only completed the four years of classroom work. Upon completion of the winter term in 1981, Ewing took Part I of the NBME (National Board of Medical Examiners) examination. All medical students at the University of Michigan were required to pass the exam with a score of 345 or higher before beginning the clinical rotations. Ewing received a score of 235, the lowest score ever recorded at the University of Michigan.[19]

Following the examination, the Promotion and Review Board unanimously voted to drop Ewing from the program. Ewing met with the Board following his dismissal and explained that several events contributed to his poor performance.[20] His mother had suffered a heart attack, he had ended a relationship with his girlfriend of 5½ years, and he had spent a great deal of time writing an essay for a contest. Ewing "reminded the Board of the time and effort he had already invested in the program and his deep desire for a career in medicine. He cited the excellent clinical work that he had done. . . ."[21]

The Board did not change the decision and Ewing filed suit in the district court. The district court agreed that Ewing had a property interest in his continued enrollment in the Interflex program. Thus, "[t]he basic issue is whether and to what extent academic decisions as to the qualifications of a medical student are subject to substantive due process."[22] The court noted, "*Horowitz* did not directly settle the question whether courts can review academic qualification decisions on substantive due process grounds."[23]

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[17] *Id.* at 90, 98 S.Ct. at 955.

[18] *Id.* at 79, 98 S.Ct. at 949. The other four justices agreed in part or dissented in part to the reasoning of the majority as evidenced by the opinions written by Justices Powell, White, Marshall, and Blackmun, *Horowitz*, 435 U.S. at 92, 98 S.Ct. at 956.

[19] *Ewing v. Regents of the University of Michigan*, 559 F.Supp.791, 794 [10 Ed.Law Rep. [174]] (E.D.Mich.1983).

[20] *Id.* at 795.

[21] *Id.* at 796.

To determine if Ewing's substantive due process had been violated the district court used the following "test": Ewing needed to show that there was "no rational basis for the University's action"[24] and that the decision to dismiss him was "motivated by bad faith or ill will related to academic performance."[25] The district court ruled in favor of the University and concluded: "[E]ven under a traditional substantive due process review, I find that the evidence demonstrates no arbitrary or capricious action since the defendants had good reason to dismiss Ewing from the program."[26]

Ewing appealed to the Court of Appeals for the Sixth Circuit and the court agreed with the district court that Ewing had a property interest in his continued enrollment in the Interflex program. The court held that "an implied understanding that a student shall not be arbitrarily dismissed from his university is a property interest, resting in the contractual relationship between the parties, which can give rise to constitutional protections."[27] The University of Michigan argued that Ewing's dismissal was not arbitrary or capricious and cited the *Medical School Bulletin*, which noted that the Promotion and Review Board had broad discretionary power to dismiss students who did not meet academic qualifications.[28]

The court of appeals reviewed the evidence and focused on a University document entitled *On Becoming a Doctor*. The pamphlet stated, "A qualified student would be given a second chance to take the NBME."[29] According to the evidence, Ewing was not aware of the document prior to taking the exam, but the court noted,

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[22] *Id.*

[23] *Id.* at 797.

[24] *Id.* (quoting *Greenhill v. Bailey*, 519 F.2d 5 (8th Cir.1975)).

[25] *Id.* (quoting *Gaspar v. Burgon*, 513 F.2d 843 (10th Cir.1975)).

[26] *Id.* at 800.

[27] *Ewing v. Regents of the University of Michigan*, 742 F.2d 913, 915 [19 Ed.Law Rep. [948]] (6th Cir.1984).

[28] *Id.*

[29] *Id.* at 916.

"This pamphlet memorialized the consistent practice of the medical school with respect to students who initially fail that examination."[30]

Therefore, the court concluded, "the University treated Ewing in an arbitrary and capricious manner by not allowing him a second opportunity to take Part I of the NBME."[31] Testimony presented at trial did not determine Ewing's status as a qualified or unqualified student. Thus, the court of appeals reversed the decision of the district court and remanded with instructions that Ewing be allowed to retake Part I of the NBME and be reinstated to the Interflex program if he passed the exam.[32]

The University of Michigan petitioned the Supreme Court for a writ of certiorari to "consider whether the Court of Appeals ha[d] misapplied the doctrine of substantive due process."[33] To begin, the Court cited *Horowitz* where it "[a]ssumed, without deciding, that federal courts can review an academic decision of a public educational institution under a substantive due process standard."[34] The Court agreed with the district court and the court of appeals, that Ewing had a protectable property interest in continued enrollment in the Interflex program.[35]

The question for the Court to decide was "whether the record compels the conclusion that the University acted arbitrarily in dropping Ewing from the Interflex program without permitting reexamination [of the NBME]."[36] The Court decided that not allowing Ewing to retake the NBME examination was not actionable by itself, but the refusal to allow a retake was important to his claim that his dismissal was arbitrary and capricious.[37] The Court noted:

> It is important to remember that this is not a case in which the procedures used by the University were unfair in any respect; quite

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[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 221, 106 S.Ct. 507, 511, 88 L.Ed.2d 523 (1985).

[34] *Id.* at 222, 106 S.Ct. at 511 (quoting *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 91-2, 98 S.Ct. 948, 955-956, 55 L.Ed.2d 124 (1978)).

[35] *Id.* at 222-23, 106 S.Ct. at 511-512.

[36] *Id.*

[37] *Id.* at 224, 106 S.Ct. at 513.

> the contrary is true. Nor can the Regents be accused of concealing nonacademic or constitutionally impermissible reasons for expelling Ewing; the district court found that the Regents acted in good faith.[38]

Evidence established that the University based the decision to dismiss Ewing on his entire academic record and used procedures outlined in the *University Catalog*. The Court noted in previous cases[39] that institutions of higher education should be free of judicial interference with relation to academic decisions:

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. *Plainly they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.*[40] (emphasis added)

This language has become the most significant language from the *Ewing* decision.

Even though he was "qualified" to take the NBME exam the first time, his failure did not automatically qualify him for a second chance. The University had the right to reevaluate Ewing's record after he failed the NBME exam. The Court did not agree with the court of appeals' reasoning that the University acted arbitrarily in allowing all other students to retake the NBME exam. Thus, the Supreme Court reversed the decision of the court of appeals.

## JUDICIAL RESPONSES

### *Is There a Property or Liberty Right?*

Before discussing the process due, lower courts must first determine if the student has a property or liberty right. The Fourteenth Amendment says, "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."[41] If no liberty or property right exists, then the discussion ends.

Students in reported cases since *Horowitz* and *Ewing* have claimed a property right in terms of admission to a program of study, in continued enrollment, to better grades, in taking an examination, and in receiving a degree. In relation to liberty interests, students have claimed a right to reputation or good name, and the right to pursue a career. Most often in the reported cases, students have claimed a property right to continued enrollment, because most of the cases involved students who had been dismissed from academic programs.

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[38] *Id.* at 225, 106 S.Ct. at 513.

[39] *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967) and *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 89-90, 98 S.Ct. 948, 954-955, 55 L.Ed.2d 124 (1978).

[40] *Ewing*, 474 U.S. at 225, 106 S.Ct. at 513.

[41] U.S. Const. Amend. XIV, § 1.

In *Horowitz*, the Supreme Court did not rule directly on whether a student removed from a program for academic reasons had a liberty interest, instead the Court *assumed* the existence of such a right and proceeded with the due process analysis.[42] The Court in *Ewing* agreed with *Horowitz* and *assumed* that a similarly-situated student had a protectable property interest in continued enrollment.[43]

In the reported federal and state cases since *Horowitz* and *Ewing*, the courts did one of four things in relation to ruling on property and liberty rights.

In ten[44] of the reported cases, the courts stated they simply assumed the existence of a property or liberty right. In seven[45]of the reported cases, the court did not determine if a property or liberty right existed. The issue was discussed in these opinions but the courts failed to make a final determination whether a right existed. The courts in nineteen[46] other reported cases ruled directly that a property or liberty right existed or did not exist. In the other twenty-three[47] cases analyzed, the courts simply did not discuss the existence of property or liberty rights. Apparently, the

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[42] 435 U.S. 78, 85, 98 S.Ct. 948, 952, 55 L.Ed.2d 124 (1978).

[43] 474 U.S. 214, 222-23, 106 S.Ct. 507, 511-512, 88 L.Ed.2d 523 (1985).

[44] *Amelunxen v. University of Puerto Rico*, 637 F.Supp. 426 [33 Ed.Law Rep. [684]] (D.P.R.1986); *Bleicker v. Board of Trustees of Ohio State*, 485 F.Supp. 1381 (S.D.Ohio 1980); *Essigmann v. Western New England College*, 11 Mass.App.Ct. 1013, 419 N.E.2d 1047 (1981); *Haberle v. University of Alabama Birmingham*, 803 F.2d 1536 [35 Ed.Law Rep. [6621] (11th Cir.1986); *Hammond v. Auburn University*, 669 F.Supp. 1555 [42 Ed.Law Rep. [178]] (M.D.Ala.1987); *Lipsett v. University of Puerto Rico*, 637 F.Supp. 789 [33 Ed.Law Rep. [693]] (D.P.R.1986); *Martin v. Helstad*, 699 F.2d 387 [9 Ed.Law Rep. [113]] (7th Cir.1983); *Mauriello v. University of Medicine and Dentistry of New Jersey*, 781 F.2d 46 [29 Ed.Law Rep. [589]] (3rd Cir. 1986); *Ross v. University of Minnesota*, 439 N.W.2d 28 [53 Ed.Law Rep. [682]] (Minn.Ct.App.1989); and *Schuler v. University of Minnesota*, 788 F.2d 510 [31 Ed.Law Rep. [770]] (8th Cir.1986).

[45] *Alanis v. University of Texas*, 843 S.W.2d 779 (Tex.Ct.App.1992); *Anderson v. University of Wisconsin*, 665 F.Supp. 1372 [41 Ed.Law Rep. [504]] (W.D.Wis.1987); *Aubuchon v. Olsen*, 467 F.Supp. 568 (E.D.Mo. 1979); *Branum v. Clark* 927 F.2d 698 [66 Ed.Law Rep. [82]] (2nd Cir.1991); *Clements v. Nassau County*, 835 F.2d 1000 [43 Ed.Law Rep. [901]] (2nd Cir.1987); *Crook v. Baker*, 813 F.2d 88 [38 Ed.Law Rep. [81]] (6th Cir.1987); *Evans v. West Virginia Board of Regents*, 165 W.Va. 780, 271 S.E.2d 778 (1980); *Goldberg v. Board of Regents of University of Colorado*, 43 Colo.App. 340, 603 P.2d 974 (1979); *Hall v. University of Minnesota*, 530 F.Supp. 104 [2 Ed.Law Rep. [712]] (D.Minn.1982); *Harris v. Blake*, 798 F.2d 419 [34 Ed.Law Rep. [64]] (10th Cir. 1986); *Ikpeazu v. University of Nebraska*, 775 F.2d 250 [28 Ed.Law Rep. [64]] (8th Cir. [523] 1985); *Lucas v. Hahn*, 162 Vt. 456, 648 A.2d 839

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[94 Ed.Law Rep. [1383]] (1994); *Paoli v. University of Delaware*, 695 F.Supp. 171 [49 Ed.Law Rep. [603]] (D.Del.1988); *Soong v. University of Hawaii at Hilo*, 72 Haw. 586, 825 P.2d 1060 [72 Ed.Law Rep. [1154]] (1992); *Stevens v. Hunt*, 646 F.2d 1168 (6th Cir.1981); *Stoller v. College of Medicine*, 562 F.Supp. 403 [11 Ed.Law Rep. [185]] (M.D.Penn.1983); *Sterman v. Florida State University Board of Regents*, 414 So.2d 1102 [4 Ed.Law Rep. [1351]] (Fla.Dist.Ct. App.1982); *Susan M. v. New York Law School*, 149 A.D.2d 69, 544 N.Y.S.2d 829 [55 Ed.Law Rep. [701]] (1989); and *Waliga v. Board of Trustees of Kent State*, 22 Ohio St.2d 55, 488 N.E.2d 850 [30 Ed.Law Rep. [503]] (1986).

[46] *See Akins v. Board of Governors of State Colleges & Universities*, 840 F.2d 1371 [45 Ed.Law Rep. [511]] (7th Cir.1988); *Alcorn v. Vaksman*, 877 S.W.2d 390 [91 Ed.Law Rep. [1201]] (Tex.Ct.App.1992); *Beheshtitabar v. Florida State University*, 432 So.2d 166 [11 Ed.Law Rep. [1122]] (Fla.Dist.Ct.App. 1983); *Bleicher v. University of Cincinnati College of Medicine*, 78 Ohio App.3d 302, 604 N.E.2d 783 [79 Ed.Law Rep. [236]] (1992); *Braham v. Brown*, 156 A.D.2d 184, 548 N.Y.S.2d 440 [57 Ed.Law Rep. [972]] (1989); *Chusid v. Albany Medical College*, 157 A.D.2d 1019, 550 N.Y.S.2d 507 [58 Ed.Law Rep. [722]] (1990); *Cosio v. Medical College of Wisconsin*, 139 Wis.2d 241, 407 N.W.2d 302 [39 Ed.Law Rep. [1280]] (1987); *Davis v Mann*, 882 F.2d 967 [55 Ed.Law Rep. [447]] (5th Cir.1989); *Dillingham v. University of Colorado Board of Regents*, 790 P.2d 851 [60 Ed. Law Rep [2251] (Colo.Ct.App.1989); *Eiland v. Wolf* 764 S.W.2d 827 [52 Ed.Law Rep. [402]] (Tex.Ct. App.1989); *Hoffman v. Grove*, 171 W.Va. 720, 301 S.E.2d 810 [10 Ed.Law Rep. [858]] (W.Va.1983); *Hubbard v. John Tyler Community College*, 455 F.Supp. 753 (E.D.Va. 1978); *Lilly v. Smith*, 790 S.W.2d 539 [61 Ed. Law Rep. [363]] (Tenn.Ct.App. 1990); *Morin v. Cleveland Metro. General Hospital*, 34 Ohio App.3d 19, 516 N.E.2d 1257 [43 Ed.Law Rep. [770]] (1986); *Morrison v. University of Oregon Health Science Center*, 68 Or.App. 870, 685 P.2d 439 [19 Ed.Law Rep. [414]] (1984); *Neel v. Indiana University Board of Trustees*, 435 N.E.2d 607 [4 Ed.Law Rep. [600]] (Ind.Ct.App.1982); *Nelson v. University of Alabama System*, 594 So.2d 632 [73 Ed.Law Rep. [573]] (Ala. 1992); *Nichols v. McDonald*, 751 F.Supp. 811 [64 Ed.Law Rep. [783]] (S.D.Iowa 1990); *North v. Iowa*, 400 N.W.2d 566 [37 Ed.Law Rep. [686]] (Iowa 1987); *Samper v. University of Rochester*, 139 Misc.2d 580, 528 N.Y.S.2d 958 [47 Ed.Law Rep. [284]] (N.Y.App.Div.1987); *Sanders v. Ajir*, 555 F.Supp. 240 [9 Ed.Law Rep. [239]] (W.D.Wis.1983); *Sofair v. State University of New York etc.* 54 A.D.2d 287, 388 N.Y.S.2d 453 (N.Y.1978), and *Watson v. University of South Alabama College of Medicine*, 463 F.Supp. 720 (S.D.Ala.1979).

[47] *Nero*, 861 P.2d at 789.

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courts assumed the existence of such a right because the courts reviewed the plaintiffs' claims that they had been deprived of substantive or procedural due process.

Even though many of the courts used *Horowitz* and *Ewing* as a basis for *assuming* the issue of property or liberty rights, it appeared that *Horowitz* and *Ewing* are not completely understood and interpreted in the same manner. In most of the cases, regardless whether a property or liberty right existed the courts proceeded to discuss the claimed deprivation of procedural or substantive due process.

### *Procedural Due Process—Notice*

Once a court determines or *assumes* the existence of a property or liberty right, then the court decides whether the student has been denied procedural due process. The components of procedural due process are (1) notice and (2) a hearing. There are two types of procedural due process notice. One type, the commonly thought of type, pertains to notification of the charges and of the details of the hearing. The other type, the one relied on in *Horowitz*, is related to notice of the "academic rules," which includes being informed in advance of grading policies for courses and requirements for programs through catalogs and syllabi, as well as being informed of performance deficiencies and negative consequences in person or in writing.

Thus, all the procedural due process that is required in a case involving an adverse academic decision is that students receive advance notice of the grading requirements and/or performance evaluations, specifically notice of the academic rules. Therefore, it would not be necessary to give the first type of notice, notice of the charges and of the details of the hearing. However, this has not been consistently followed in all of the reported cases. In the cases reviewed for this study, the courts discussed notice in twenty-nine cases, and followed *Horowitz* and did not address the issue of notification related to a hearing.[48] But, in six cases, notice was discussed as it related to the hearing, and the courts ruled in favor of the institutions only three times.[49]

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[48] *See Akins v. Board of Governors of State Colleges and Universities*, 840 F.2d 1371 (7th Cir.1988); *Alanis v. University of Texas*, 843 S.W.2d 779 (Tex.Ct.App.1992); *Amelunxen v. University of Puerto Rico*, 637 F.Supp. 426 (D.P.R.1986); *Beheshtitabar v. Florida State University*, 432 So.2d 166 (Fla.Dist.Ct.App. 1983); *Bleicher v. University of Cincinnati College of Medicine*, 78 Ohio App.3d 302, 604 N.E.2d 783 (1992); *Braham v. Brown*, 156 A.D.2d 184, 548 N.Y.S.2d 440 (1989); *Branum v. Clark* 927 F.2d 698 (2nd Cir. 1991); *Chusid v. Albany Medical College*, 157 A.D.2d 1019, 550 N.Y.S.2d 507 (N.Y.App.Div.1990); *Cosio v. Medical College of Wisconsin, Inc.*, 139 Wis.2d 241, 407 N.W.2d 302 (1987); *Dillingham v. University of Colorado Board of Regents*, 790 P.2d 851 (Colo.Ct App.1989); *Eiland v. Wolf*, 764 S.W.2d 827 (Tex.Ct.App.1989); *Essigmann v. Western New England College*, 11 Mass.App.Ct. 1013, 419 N.E.2d 1047 (1981); *Goldberg v. Board of Regents of University of Colorado*, 43 Colo.App. 340, 603 P.2d 974 (1979); *Hall v. University of Minnesota*, 530 F.Supp 104 (D.Minn.1982); *Hammond v. Auburn University*, 669 F.Supp. 1555 (M.D.Ala.l987); *Henson v. Honor Committee of University of Virginia*, 719 F.2d 69 (4th Cir.l983); *Ikpeazu v. University of Nebraska*, 775 F.2d 250 (8th Cir.1985); *Lilly*

In each of the three cases, the courts found that the students received much more traditional notice than required by law. The courts did not comment on the reasons why the postsecondary institutions exceeded legal requirements; they only ruled that the procedures used were appropriate.

For example, in *Davis v. Mann*,[50] Davis brought suit for violation of procedural due process after he was dismissed from dental school.[51] During a meeting to discuss his poor academic performance, faculty members voted to recommend his dismissal from the residency program. Davis received a letter from the dean notifying him of the dismissal. The letter stated that Davis "was being dismissed for academic reasons and that he would be afforded an ad hoc committee hearing if he so requested."[52] He requested a hearing and was notified by letter on April 30 that the hearing would be held on May 8. The letter listed the charges and a list of the witnesses that would appear on behalf of the university.[53]

Davis then filed suit and claimed that the university did not provide adequate notice of the charges in order to prepare for the hearing. He also believed that he was entitled to more procedural protection because he was an employee in a residency program.

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*v. Smith*, 790 S.W.2d 539 (Tenn.Ct.App.1990); *Morin v. Cleveland Metropolitan General Hospital*, 34 Ohio App.3d 19, 516 N.E.2d 1257 (1986); *Morrison v. University of Oregon Health Sciences Center*, 68 Or.App. 870, 685 P.2d 439 (1984); *Nelson v. University of Alabama System*, 594 So.2d 632 (Ala.1992); *Ochsner v. Board of Trustees of Washington Community College*, 61 Wash.App. 772, 811 P.2d 985 (1991); *Paoli v. University of Delaware*, 695 F.Supp. 171 (D.Del.1988); *Samper v. University of Rochester*, 139 Misc.2d 580, 528 N.Y.S.2d 958 (N.Y.App.Div.1987); *Soong v. University of Hawaii at Hilo*, 72 Haw. 586, 825 P.2d 1060 (1992); *Susan M. v. New York Law School*, 149 A.D.2d 69, 544 N.Y.S.2d 829 (1989); *Waliga v. Board of Trustees of Kent State University*, 22 Ohio St.3d 55, 488 N.E.2d 850 (1986); and *Watson v. University of Southern Alabama College or Medicine*, 463 F.Supp. 720 (S.D.Ala.1979).

[49] *Davis v. Mann*, 882 F.2d 967 (5th Cir.1989); *Lipsett v. University of Puerto Rico*, 637 F.Supp. 789 (D.P.R.1986); *Sanders v. Ajir*, 555 F.Supp. 240 (W.D.Wis.1983).

[50] *Davis v. Mann*, 882 F.2d 967 [55 Ed.Law Rep. [447]] (5th Cir.1989).

[51] *Id.*

[52] *Id.* at 971.

[53] *Id.*

The district court ruled that Davis had received adequate notice, learning of the complaints and of the names of the witnesses who would testify against him.[54] The court of appeals agreed with the district court stating that the letter of April 30, 1986, provided ample notice of the charges.[55]

In the other three[56] cases where notice of the charges was discussed, the courts ruled that the plaintiffs were entitled to a more traditional type of procedural due process notice than given by the postsecondary institutions. In each of these cases the courts required procedural requirements much greater than required in *Horowitz*.

For example, in *Alcorn*, Fabian Vaksman was dismissed from a graduate program in history. This came as a shock as he was unaware that the university was considering his dismissal prior to receiving the letter. He claimed that the university violated his state and federal rights to procedural due process.

The court agreed with Vaksman that he was entitled to more procedural due process, though the court noted from *Horowitz*, "A dismissal for academic reasons calls for far less stringent procedural requirements,"[57] Even though the court agreed that his dismissal was for academic reasons, it still required that he be given notice of the charges prior to receiving a hearing.

In another case, *Evans v. West Virginia Board of Regents*,[58] the student applied for readmission after being told that he was no longer a student because he failed to follow the procedures as outlined in his original leave agreement. When he reapplied, he was denied admission and was given no reasons for the denial.[59] The court noted, "In the event the appellees should seer: to terminate appellant's continued medical education, they must afford him the following due process protections: ... a sufficient opportunity to prepare a defense to the charges. . . ."[60]

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[54] 721 F.Supp. 796, 799 [56 Ed.Law Rep. [810]] (S.D.Miss.1988).

[55] 882 F.2 967, 975 (5th Cir.1989). Both courts considered Davis a student in an academic program, not an employee, as he asserted.

[56] *Alcorn v. Vaksman*, 877 S.W.2d 390 (Tex.Ct.App.1994); *Evans v. West Virginia Board of Regents*, 165 W.Va 780, 271 S.E.2d 778 (1980); and *Sterman v. Florida Stte Board of Regents*, 414 So.2d 1102 (Fla.Dist.Ct.App.1982).

[57] 435 U.S. 78, 86, 98 S.Ct. 948, 952, 55 L.Ed.2d 124 (1978).

[58] 271 S.E.2d 778 (W.Va. 1980).

[59] *Id.* at 780.

[60] *Id.* at 781.

In the third case[61] the student won because the university failed to follow state law procedures. Jeffrey Sterman, a doctoral student, was not granted a degree because he did not pass the oral examination of his dissertation. He claimed that he was not given adequate notice for requesting a hearing. Florida state law required that notice include a time limit for requesting a hearing and reference to the university's procedural rules.[62] The court noted, "[A]ctual notice of such agency action which did not inform [Sterman] of his right to request a hearing and the time limits for doing so would be inadequate to trigger the commencement of administrative process."[63]

The above-mentioned cases illustrate instances where the postsecondary institution granted more procedural due process than required or where the court required more procedural due process notice. The cases show how infrequently some institutions and courts have interpreted *Horowitz* to mean that the traditional type of notice of the charges is required.

### *Horowitz Notice -- Notice of the Academic Rules*

In most instances the courts quickly received the message from the *Horowitz* decision that "notice" meant notice of the academic rules. This is evidenced by *Sofair v. State University of New York*[64] a case that was in the courts at the time *Horowitz* was decided. Ezra Sofair maintained the university violated his procedural due process right to notice because the hearing was held within a matter of hours after he received notice of his dismissal. He claimed that he did not have sufficient time to prepare for the hearing with only a few hours notification.

In 1976, using pre-*Horowitz* logic, the district court ruled that Sofair was entitled to a ". . . detailed written statement of the evidence relied upon in concluding that he lacked clinical aptitude. . . ."[65] In 1978, post-*Horowitz*, this case was back in court and the state court of appeals ruled that Sofair was not denied procedural due process. The court noted, "In this instance, as in *Horowitz*, the student had previously been informed of the school's dissatisfaction with his progress, and the dismissal was for academic cause."[66] Thus, as in *Horowitz* and other academic cases, students are not

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[61] *Sterman v. Florida State Board of Regents*, 414 So.2d 1102 (Fla.Dist.Ct.App. 1982).

[62] *Id.* at 1104.

[63] *Id.*

[64] 54 A.D.2d 287, 388 N.Y.S.2d 453 (1978).

[65] *Id.* at 458.

[66] *Sofair v. State University of New York*, 44 N.Y.2d 475, 406 N.Y.S.2d 276, 277, 377 N.E.2d 730, 731 (N.Y.Ct.App.1978).

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entitled to traditional procedural due process notice as long as they receive the necessary notice about the academic rules and academic deficiencies. This case clearly demonstrates how *Horowitz* changed the focus of procedural due process notice in adverse academic decisions from notice about the charges and the hearing to notice of performance.

Other cases show further evidence that lower courts understand the requirements of *Horowitz* to mean notice of the academic rules. In the majority of the reported cases, the courts have not required additional procedural due process but have continued to follow the precedent related to procedural due process established by *Horowitz*. Even though some postsecondary institutions have given notice of a hearing, most have only given notice related to the academic rules. Thus, if students are notified of the academic rules, given a warning or probationary status, or notified of their deficiencies along the way, then the procedural due process requirements of notice will be met in accordance with *Horowitz*.

In the cases, the type and extent of the notice received by the students varied. The extent of the notice ranged from receiving a university catalog to having several meetings to discuss the deficiencies.

In two instances, *Bleicker v. Board of Trustees of Ohio State*[67] and *Schuler v. University of Minnesota*,[68] the postsecondary institutions provided that students with notice in a university bulletin prior to the adverse decision. The institutions claimed it was the students' responsibility to monitor their progress in accordance with the policies in the university bulletin.

For example, Joanne Schuler had been given a bulletin that outlined the requirements for the oral examination for a doctoral degree in psychology.[69] She failed the oral examination the first time and was granted a retake. Her advisor discussed the examination procedures with her and informed her of the possibility of dismissal if she failed a second time. She failed the examination again and was dismissed from the program. Schuler claimed that the university violated her rights to procedural due process. The court did not agree and noted that she had not only received notice prior to taking the examinations but was informed by her advisor of the consequences if she failed a second time.[70]

Most often students receiving notice were informed of their deficiencies through letters or in-person meetings with advisors or committees. There were eleven cases[71] where the student received notice from a progress committee, faculty advisor, or dean about deficiencies and requirements for improvements. In each of these eleven cases the postsecondary institutions met the minimum procedural due process requirements of notice. In some instances courts commented that the students received more notice than Horowitz had received concerning her deficiencies. Although not required by the law, postsecondary institutions have continued to provide notice in excess of what the Court in *Horowitz* required.[72]

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[67] 485 F.Supp. 1381 (S.D.Ohio, 1980).

[68] 788 F.2d 510 (8th Cir.1986).

[69] *Id.*

[70] *Id.*

As an example, in *Sanders v. Ajir*,[73] Darrell Sanders claimed his due process rights were violated by the University of Wisconsin School of medicine when he was dismissed. At the end of his second year, the Promotions Committee met to review his academic record. Sanders had a low grade point average, and some of the faculty were concerned about his "conflictual interpersonal relationships." As a result of these problem areas, the Committee did not promote Sanders to the third year and scheduled a meeting with him. During the meeting, Sanders was informed in person of his deficiencies in the classroom and clinical setting. After deliberation, the Committee voted to expel Sanders from the School of Medicine.

The Education Policy Council heard Sanders' appeal and overturned the decision of the Promotions Committee. Two faculty members were appointed to establish a third year curriculum that included remedial work in the Introduction to Clinical Medicine course. Members of the Council also recommended that Sanders seek psychological counseling.

During his third year, he continued to receive poor grades in his clinical courses and neglected to pursue counseling. The Promotions Committee discussed the following problems with him: "failed examination in medicine and low grades in orthopedics, and questions about plaintiff's competence, attitude, judgment and ability to work with others."[74] Following the discussion, the Committee voted to expel Sanders for the second time from the program.

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[71] *Alanis v. University of Texas*, 843 S.W.2d 779 (Tex.Ct.App.1992); *Anderson v. University of Wisconsin*, 665 F.Supp. 1372 (W.D.Wis.1987), *Delaney v. Heimstra*, 288 N.W.2d 769 (S D.1980); *Hubbard v. John Tyler Community College*, 455 F.Supp. 753 (E.D.Va.1978); *Lunde v. Iowa Board of Regents*, 487 N.W.2d 357 (Iowa Ct.App.1992); *Mauriello v. University of Medicine and Dentistry of New Jersey*, 781 F.2d 46 (3rd Cir. 1986); *Neel v. Indiana University Board of Trustees*, 435 N.E.2d 607 (Ind.Ct.App.1982); *Nichols v. McDonald*, 751 F.Supp. 811 (S.D.Iowa 1990); *Sanders v. Ajir*, 555 F.Supp. 240 (W.D.Wis.1983); *Sofair v. State University of New York* 54 A.D.2d 287, 388 N.Y.S.2d 453 (1978); and *Tobias v. University of Texas*, 824 S.W.2d 201 (Tex.Ct.App.1991).

[72] *Sanders v. Ajir*, 555 F.Supp. 240 (W.D.Wis.1983); *Nichols v. McDonald*, 751 F.Supp. 811 (S.D.Iowa 1990); and *Alanis v University of Texas*, 843 S.W.2d 779 (Tex.Ct.App.1992).

[73] 555 F.Supp. 240 (W.D.Wis.1983).

Sanders claimed that the university violated his right to procedural due process. The court determined he actually received *both* types of notice and the court ruled, "[T]he procedural protections afforded plaintiff prior to his expulsion went far beyond that embraced by the Supreme Court in *Horowitz*."[75] The court further noted that the procedural process used even exceeded the requirements of *Goss*.[76]

Another medical student brought suit against a university in *Nichols v. McDonald*.[77] During his first year, Richard Nichols, a student at the University of Iowa College of Medicine, failed two courses. He was placed on probation and allowed to repeat the courses at another institution during the summer. He removed the deficiencies and was removed from academic probation. He passed all fall courses, but experienced difficulty in the Introduction to Clinical Medicine course during the spring term. He failed the course and again was placed on probation and required to remove the deficiency. He appealed and requested a make-up exam, but his request was denied. Nichols sat out the following semester and returned a year later to retake the Introduction to Clinical Medicine course. He failed the course again and was notified that the Committee on Student Promotions would review his record. The Committee voted to cancel his registration.

Nichols then brought suit against the university for violating his right to procedural due process. However, the court ruled that he had received notice of faculty dissatisfaction through letters and that he was aware of his academic standing in the College of Medicine. Again the court noted, "The record clearly indicates that plaintiff received procedural due process far in excess of what is constitutionally mandated."[78]

In another case,[79] Artemio Alanis experienced several academic problems in the medical program. His advisor warned him of the consequences of his behavior and told him he was developing a pattern of missing examinations.[80] He later met with other professors to discuss his continued academic difficulties but failed to improve and was dismissed.

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[74] *Id.* at 245.

[75] *Id.* at 247.

[76] *Id.* at 248 (citing *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975)).

[77] 751 F.Supp. 811 (S.D.Iowa 1990).

[78] *Id.*

[79] *Alanis v. University of Texas*, 843 S.W.2d 779 (Tex.Ct.App.1992)

[80] *Id.* at 782.

Alanis then filed suit claiming the university violated his procedural due process right. However the court ruled, as in the previous cases, that Alanis was notified of his academic problems and was not deprived of procedural due process.

In ten other cases[81] the postsecondary institutions provided the students with advance notice through a catalog or course syllabus, told them about their deficiencies as they occurred, or also gave them a probationary time to improve deficiencies.

For example, in *Stoller v. College of Medicine*,[82] the student received notice of the academic rules, was put on probation and given a time period to improve, and received notice of his deficiencies as they occurred. Stoller received a college bulletin that outlined the program requirements prior to beginning the program. In his first semester, Stoller received a grade of "F" in microbiology. He was notified by the Assistant Dean that he was on academic probation. During the next term, he failed another required course and was notified that his performance would be reviewed by the Promotions Committee. The Committee recommended that Stoller improve his performance and noted that his academic record would be reviewed at the end of the spring term and that he would be subject to dismissal if he did not improve his academic performance.

He completed the first year and was allowed to enroll in the second year program, but had to retake two courses. During the third year, Stoller failed a surgery clerkship and was notified of another meeting before the Promotions Committee. The Committee put Stoller back on academic probation and warned him that further academic deficiencies would result in his dismissal. He later received a second failing grade in a required clerkship and was dismissed from the program.

Stoller claimed that the College of Medicine violated his right to procedural due process. However, the court concluded, "As the record establishes, at every stage of the decision making process, Stoller was informed of the nature of the proceedings against him. . . . Simply stated, it is incredible that Stoller contends he did not have adequate notice. . . ."[83] Therefore, the court agreed that the process afforded Stoller was appropriate in relation to the requirements of *Horowitz*.[84]

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[81] *Davis v. Mann*, 882 F.2d 967 (5th Cir.1989); *Dillingham v. University of Colorado v. Board of Regents*, 790 P.2d 851 (Colo.Ct.App.1989); *Eiland v. Wolf* 764 S.W.2d 827 (Tex.Ct.App.1989); *Haberle v. University of Alabama Birmingham*, 803 F.2d 1536 (11th Cir.1986); *Hoffman v. Grove*, 171 W.Va. 720, 301 S.E.2d 810 (1983); *Mohammed v. Mathog*, 635 F.Supp. 748 (E.D.Mich.1986); *Morin v. Cleveland Metropolitan General Hospital*, 34 Ohio App.3d 19, 516 N.E.2d 1257 (1986); *Ross v. University of Minnesota*, 439 N.W.2d 28 (Minn.Ct.App.1989); *Stoller v. College of Medicine*, 562 F.Supp.403 (M.D.Penn.1983); and *Wilkenfield v. Powell*, 577 F.Supp.579 (W.D.Tex.1983).

[82] 562 F.Supp. 403 (M.D.Penn.1983).

In another case, *Haberle v. The University of Alabama in Birmingham*,[85] Frederick Haberle filed suit against the university after he was dismissed from the Ph.D. program in chemistry. A university document, "Requirements for the Degree in Chemistry," stated the requirements to be: "a student must complete all the course work, demonstrate competence in two foreign languages, successfully complete the qualifying exams, present at two Seminars, and complete the dissertation."[86] Haberle was aware of the requirements but proceeded to work on his dissertation for three years without having taken his qualifying exams. The Graduate Committee discovered that he had not completed the exams and instructed him to do so before proceeding further on his dissertation. He passed the written portion of the exam, but failed the oral part. He was given the option of accepting a master's degree or retaking the exam. He failed the exam for a second time and was dismissed from the program.

The court did not agree that the institution had violated Haberle's right to notice: The court noted, "[He] had several discussions with members of the graduate committee. . . . In fact, University officials testified that the procedures afforded Haberle far exceeded the grievance procedure outlined in the University *Bulletin*"[87]

In the above-mentioned cases, the institutions won because they had provided appropriate notice of the academic rules. In many of the cases, the institutions actually went beyond the amount of notice that Horowitz had received and the courts often noted this effort with approval.

### *Procedural Due Process -- Hearing*

Traditionally, in a procedural due process analysis, after the court has determined if there is a property or a liberty right, the court discusses the process due. Then, as part of that step, after discussing the notice due, the court discusses the hearing.

But in *Horowitz*, the Supreme Court clarified the requirements of a hearing for adverse academic decisions. The Court noted:

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[83] *Id.* at 415.

[84] *Id.*

[85] 803 F.2d 1536 (11th Cir.1986).

[86] *Id.* at 1538.

[87] *Id.* at 1539.

> We conclude that considering all relevant factors, including the evaluative nature of the inquiry and the significant and historically supported interest of the school in preserving its present framework for academic evaluations, *a hearing is not required* by the Due Process Clause of the Fourteenth Amendment.[88]

Because the Court has ruled that a hearing is not required, it should not be necessary to discuss hearings in relation to adverse academic decisions. And yet, postsecondary administrators and judges have not always followed this seemingly simple legal rule.

In some cases, for reasons not explained in the opinions, the postsecondary institutions have provided students facing adverse academic decisions with a hearing. There have been variations among these hearings and more often they have not reflected the formality of a trial in a courtroom. Even though a hearing is not required, in seventeen cases[89] the courts discussed the requirements of a hearing in the opinions.

One case was decided initially before *Horowitz*, but was later overturned by an appeals court after the *Horowitz* ruling. Ezra Sofair maintained the university violated his procedural due process rights as it related to a hearing because the hearing was held within a matter of hours after he received notice of his dismissal.[90] He claimed that he did not have sufficient time to prepare for the hearing with only that few hours notification.

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[88] *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78, 86, 89, 98 S.Ct. 948, 952, 954, 55 L.Ed.2d 124 (1978).

[89] *Alanis v. University of Texas*, 843 S.W.2d 779 (Tex.Ct.App.1992); *Beheshtitabar* v. *Florida State University*, 432 So.2d 166 (Flat Dist.Ct.App.1983); *Bleicker v. Board of Trustees of Ohio State*, 485 F.Supp. 1381 (S.D.Ohio 1980); *Crook v. Baker*, 813 F.2d 88 (6th Cir.1987); *Eiland v. Wolf;* 764 S.W.2d 827 (Tex.Ct.App.1989); *Hoffman v. Grove*, 171 W.Va. 720, 301 S.E.2d 810 (1983); *Lucas v. Hahn*, 162 Vt. 456, 648 A.2d 839 (1994); *Martin v. Helstad*, 578 F.Supp. 1473 [16 Ed.Law Rep. [428]] (W.D.Wis.1983); *Mauriello v. University of Medicine and Dentistry of New Jersey.*, 781 F.2d 46 (3rd Cir.1986); *Mohammed v. Mathog*, 635 F.Supp. 748 (E.D.Mich.1986); *Nelson v. University of Alabama System*, 594 So.2d 632 (Ala.1992) *Nichols v. McDonald*, 751 F.Supp. 811 (S.D.Iowa1990); *Ross v. University of Minnesota*, 439 N.W.2d 28 (Minn.Ct.App.1989); *Samper v. University of Rochester*, 139 Misc.2d 580, 528 N.Y.S.2d 958 (1987); *Sanders v. Ajir* 555 F.Supp. 240 (W.D.Wis.1983); *Sofair v. State University of New York*, 54 A.D.2d 287, 388 N.Y.S.2d 453 (1978); and *Stoller v. College of Medicine*, 562 F.Supp. 403 (M.D.Penn.1983).

[90] *Sofair v. State University of New York* 54 A.D.2d 287, 388 N.Y.S.2d 453 (N.Y.1978)

In 1976 using pre-*Horowitz* logic, the district court ruled that Sofair was entitled to ". . . an opportunity for an informal hearing after reasonable time to prepare for it. After such a hearing the Medical College will be in a better position to make a judgment as to petitioner's right to continue to pursue his medical studies."[91] This logic represented *Dixon*[92] requirements tempered by *Goss*.[93]

However, in 1978, post-*Horowitz*, this case was back in court and the state court of appeals ruled that Sofair had not been denied procedural due process. The court noted, "In this instance, as in *Horowitz*, the student had previously been informed of the school's dissatisfaction with his progress, and the dismissal was for academic cause."[94] Thus, as in *Horowitz* and in other academic cases, students are not entitled to a hearing as long as they received the necessary notice about the academic rules and their academic deficiencies. This case demonstrates again how *Horowitz* changed the focus of procedural due process requirements in adverse academic decisions from notice of the charges and a hearing to notice about performance and no hearing.

In six[95] other cases, the students received a procedural due process hearing prior to the adverse decision. Even though the facts of the cases differed, the court in each case declined to address the hearing question because of the ruling from *Horowitz*. Each court recognized that *Horowitz* required no hearing and, therefore, ruled in favor of the postsecondary institutions.

In some of the cases where the students received hearings from the institutions, the courts ruled in favor of the defendants, using the ruling from *Horowitz*. For example, in *Sanders v. Ajir*.[96] Darrell Sanders claimed his procedural due process rights were violated by the University of Wisconsin School of Medicine when he was dismissed. Prior to his dismissal, the Promotions Committee scheduled a meeting with him. Sanders attended the meeting and was allowed to present his interpretation of the events and of his performance. Sanders left the meeting and committee members voted to expel him from the program.

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[91] *Id.* at 458.

[92] *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930, 82 S.Ct. 368, 7 L.Ed.2d 193 (1961). Dixon required "[a] hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail. . . ." *Id.* at 159.

[93] *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). Tempered by allowing Sofair the opportunity for an informal hearing.

[94] *Sofair v. State University of New York*, 44 N.Y.2d 475, 406 N.Y.S.2d 276, 277, 377 N.E.2d 730, 731 (N.Y.Ct.App.1978).

[95] *Beheshtitabar v. Florida State University*, 432 So.2d 166 (Fla.Dist.Ct.App.1983); *Bleicker v. Board of Trustees of Ohio State*, 485 F.Supp. 1381 (S.D.Ohio 1980); *Hoffman v. Grove*, 171 W.Va. 720, 301 S.E.2d 810 (1983); *Martin v. Helstad*, 578 F.Supp. 1473 (W.D.Wis.1983) *Nelson v. University of Alabama System*, 594 So.2d 632 (Ala.1992); and *Samper v. University of Rochester*, 528 N.Y.S.2d 958 (N.Y.App.Div.1987).

Sanders won on an appeal to remain in the program and he continued his course of study. He continued to experience academic difficulty and again was asked to appear before the Promotions Committee. During the meeting, Sanders was told about his continued academic problems and was given an opportunity to explain his situation. Minutes of the meeting were taken and tape recorded. The Committee voted to dismiss Sanders and he was notified in writing of the decision.

The court ruled, "[T]he procedural protections afforded plaintiff prior to his expulsion went far beyond that embraced by the Supreme Court in *Horowitz*."[97] The court found that the procedural process used even exceeded the requirements of *Goss*.[98]

In another case, the student was granted an in-person hearing, but he failed to attend. Noor Mohammed brought suit after he was dismissed from a residency training program.[99] During the first term of his residency, the faculty placed Mohammed on probation because of his poor performance during conferences and ward rounds.[100] He was also assigned to meet weekly with a special advisor and continued to be evaluated by the faculty and meet with his advisor. His evaluations were marginal and he did not make the necessary improvements.

Mohammed continued to perform poorly but was given extensions to improve his clinical abilities. As a result of his continued poor evaluations, the faculty called for a formal evaluation and determined that Mohammed should be terminated from the residency. Mohammed was invited to attend the meeting but was unable to attend because he was out of town.

He then brought suit claiming the university violated his right to procedural due process because he was not present for the evaluation meeting. The court did not

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[96] *Sanders v. Ajir*, 555 F.Supp. 240 (W.D.Wis.1983).

[97] *Id.* at 247.

[98] *Id. Goss* required [t]hat there be at least an informal give-and-take between the student and disciplinarian, preferably prior to the suspension." *Goss v. Lopez*, 419 U.S. 565, 584, 95 S.Ct. 729, 741, 42 L.Ed.2d 725 (1974).

[99] *Mohammed v. Mathog*, 635 F.Supp. 748 (E.D.Mich.1986).

[100] *Id.* at 749.

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agree and stated, "Due process does not require that a student be present when the crucial decision to terminate is made."[101]

In one case, *Stoller v. College of Medicine*,[102] the student had the opportunity to present his side of the facts to a dean. Kenneth Stoller was dismissed after poor academic performance. In his first semester, he received a grade of "F" in microbiology and was notified by the assistant dean that he was on academic probation. During the next term, he failed another required course and was notified that his performance would be reviewed by the Promotions Committee. The Committee recommended that his performance must improve, and noted that his academic record would be reviewed at the end of the spring term, and that he would be subject to dismissal if he did not improve his academic performance.

During the third year, Stoller failed a surgery clerkship and was notified of another meeting before the Promotions Committee. The Committee put Stoller back on academic probation and warned him that further academic deficiencies would result in his dismissal. He later received a second failing grade in a required clerkship.

The Dean scheduled a meeting with Stoller to discuss his poor performance and to discuss the recommendation from the Committee that he be dismissed. During the meeting, the Dean discussed the Committee's recommendation with Stoller and asked him to explain the reasons for his deficiencies. Stoller attempted to clarify the reasons for his problems and objected to the failing grades he had received. The Dean reviewed the letter and his academic file and decided to dismiss Stoller from medical school.

Stoller claimed that the College of Medicine violated his right to procedural due process, but the court concluded, "As the record establishes at every stage of the decision making process, Stoller was informed of the nature of the proceedings against him, was given an opportunity to be heard and was told of the outcome of those proceedings."[103] Therefore, the court agreed that the process afforded Stoller was appropriate and even exceeded the requirements of *Horowitz*.[104]

In two instances students won the right for a procedural due process hearing. Jeffrey Sterman,[105] a doctoral student, was not granted a degree because he did not pass the oral examination on his dissertation. The dissertation committee informed him that he could have a Doctor of Education degree instead of the Doctor of Philosophy degree. He accepted the offer but did not receive the degree because it was later determined the committee did not have the authority to make such arrangements.

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[101] *Id.* at 751.

[102] 562 F.Supp.403 (M.D.Penn.1983).

[103] *Id.* at 415.

[104] *Id.*

[105] *Sterman v. Florida State Board of Regents*, 414 So.2d 1102 (Fla.Dist.Ct.App. 1982).

Sterman did not know that he could have requested a hearing under Florida law[106] and claimed that he was entitled to the minimum procedures required by state law. The court agreed with Sterman and ruled that he should have received a hearing because of the way in which the university revoked the offer of the Doctor of Education degree and failed to follow state law procedures.[107]

In another case,[108] John Morrison had been dismissed from dental school following a hearing with the Academic Dismissal Hearing Committee. Morrison attended the hearing with his attorney and shared his side of the facts about his academic performance. The committee went into closed session to review the evidence and make a decision. During the closed session the committee listened to additional statements about Morrison from a faculty member not on the committee. Morrison claimed he did not have an opportunity to rebut the information and should have been given a new hearing.

The court agreed with Morrison and reversed and remanded the case for further consideration.[109] The court relied on a statement in the student guide as a basis for the decision: "The hearing committee will do the following: . . . review and evaluate only the evidence and information presented at the hearing. . . .[110] The court concluded:

> We find that the committee erred materially in discussing matters not in the record, particularly when such discussion included a nonmember of the committee. The entire purpose of a hearing is undermined when relevant factual information is discussed and

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[106] Florida Administrative Code Rule 28-5.111 permits an agency to deny a petition for administrative hearing if it is not filed within 21 days of the date on which the petitioner received written notice of the agency's decision. The notice must state the time limit for requesting a hearing and refer to the agency's procedural rules.

[107] *Sterman v. Florida State Board of Regents*, 414 So.2d 1102, 1104 (Fla.Dist.Ct. App.1982).

[108] *Morrison v. University of Oregon Health Sciences Center*, 68 Or.App. 870, 685 P.2d 439 (1984).

[109] *Id.* at 443.

[110] *Id.* at 441.

> considered for the first time in a closed session without the opportunity for objection or response.[111]

Even though the court ruled that the university-adopted hearing procedures were unfair, was a hearing actually necessary before Morrison's dismissal? Under *Horowitz*, the answer would be "no." Judge Young required the university in this case to do in a statutorily-sound way what it was not required to do constitutionally under the *Horowitz* decision.

Seventeen years after the *Horowitz* decision, the courts still agree that very limited procedural due process is required in instances of adverse academic decisions. If students and administrators understood and accepted this interpretation, there would be little or no litigation. But students are not convinced. When they believe postsecondary institutions have violated their due process rights, they have brought suits, but have continued to lose.

### *Substantive Due Process*

Over the past ten years, twenty-five students have brought suit claiming a postsecondary institution violated their right to substantive due process. As noted by the Supreme Court in *Ewing*, as long as an adverse academic decision or the process used to determine the decision is not a "substantial departure from accepted academic norms,"[112] the substantive due process rights of a student have not been violated.

Students still continue to use this argument to bring suit. In all but two cases, however the postsecondary institutions won as the courts used *Ewing* to guide the outcome. One court summed up the dominant judicial attitude by stating, "[A]cademic decisions must be reviewed by the courts under the narrow and restrained standard enunciated by the United States Supreme Court [in *Ewing*][113]

In the majority of the substantive due process cases[114] since *Ewing* the courts simply noted, *"Plainly they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."*[115] For example, Helen Clements and Victoria Morin were dismissed from nursing programs after failing to meet the minimum requirements.[116] The courts noted that both dismissals were based on academic performance and failure to meet the required guidelines. Therefore, the institutions did not depart from accepted academic norms when dismissing the students.

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[111] *Id.* at 443. The ruling was based on an Oregon statute, ORS § 183.482(7): "The court shall remand the order for further agency action if it finds that either the fairness of the proceeding or the correctness of the action may have been impaired by material error in procedure or a failure to follow prescribed procedure."

[112] *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225, 106 S.Ct. 507, 513, 88 L.Ed.2d 523 (1985).

[113] *Eiland v. Wolf*, 764 S.W.2d 827, 835 (Tex.Ct.App.1989).

[114] *Alanis v. University of Texas*, 843 S.W.2d 779, 789 (Tex.Ct.App.1992); *Amelunxen v. University of Puerto Rico*, 637 F.Supp. 426, 431 (D.P.R.1986); *Anderson v. University of Wisconsin*, 665 F.Supp. 1372, 1396 (W.D.Wis.1987); *Bleicher v. University of Cincinnati College of Medicine*, 78 Ohio App.3d 302, 604

In two similar cases, medical residents, James Ross and Bruce Dillingham, claimed the universities did not follow the procedures as stated in the agreements made prior to their dismissals. Both had been notified about the faculty's dissatisfaction with their performance and had been placed on probation. The courts did not agree that they had been denied substantive due process. The court in *Ross* stated, "The decision was careful and deliberate. It cannot be said that the University acted arbitrarily in terminating Ross, or that the decision demonstrates a total lack of professional judgment."[117] The court in *Dillingham* agreed, "[T]here is no evidence that this procedure departed from accepted academic norms."[118]

In another case, *Anderson v. University of Wisconsin*,[119] the court discussed how Fradus Anderson did not provide evidence that the university departed from

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N.E.2d 783, 788 (Ohio Ct.App 1992); *Clements v. Nassau County*, 835 F.2d 1000, 1005 (2nd Cir.1987); *Crook v. Baker*, 813 F.2d 88, 100 (6th Cir.1987); *Dillingham v. University of Colorado Board of Regents*, 790 P.2d 851, 855 (Colo.App.Ct. 1989); *Eiland v. Wolf*, 764 S.W.2d 827, 835 (Tex.Ct.App.1989); *Haberle v. University of Alabama in Birmingham*, 803 F.2d 1536, 1539 (11th Cir.1986); *Hammond v. Auburn*, 669 F.Supp. 1555, 1561 (M.D.Ala.1987); *Harris v. Blake*, 798 F.2d 419 (10th Cir.1986); *Morin v. Cleveland Metropolitan General Hospital*, 34 Ohio App.3d 19, 516 N.E.2d 1257, 1260 (1986); *North v. Iowa*, 400 N.W.2d 566, 571 (Iowa 1987); *Ross v. University of Minnesota*, 439 N.W.2d 28, 34 (Minn.App.Ct.1989); *Schuler v. University of Minnesota*, 788 F.2d 510 516 (8th Cir.1986); and *Tobias v. University of Texas*, 824 S.W.2d 201, 210 (Tex.Ct.App.1991).

[115] *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985).

[116] *Clements v. Nassau County*, 835 F 2d 1000, 1005 (2nd Cir.1987); and *Morin v. Cleveland Metropolitan General Hospital*, 34 Ohio App.3d 19, 516 N.E.2d 1257, 1260 (Ohio Ct.App.1986).

[117] *Ross v. University of Minnesota*, 439 N.W.2d 28, 35 (Minn.App.Ct.1989).

[118] *Dillingham v. University of Colorado Board of Regents*, 790 P.2d 851, 854 (Colo.App.Ct.1989).

[119] 665 F.Supp. 1372 (W.D.Wis.1987).

accepted academic norms. Anderson had been denied readmission to the law school after he had been dismissed. The court noted:

> [T]he record shows that the committee thoroughly examined plaintiffs case and had numerous reasons to deny plaintiff's petitions. These reasons included plaintiff's grades in Law School and Business School, his prior history of dropping the second semester of his first year of Law School, his alcoholism, and his alleged harassment of his legal writing partner."[120]

The court concluded that the committee used professional judgment and was not arbitrary and capricious in denying Anderson readmission to the Law School.

In six[121] other cases, the courts agreed that the plaintiffs failed to prove that the

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[120] *Id.* at 1396-97.

[121] *Alanis v. University of Texas,* 843 S.W.2d 779, 789 (Tex.Ct.App.1992). Alanis had been dismissed from medical school after being notified of his poor performance, given an opportunity to improve, and given an opportunity to present his case to the Student Evaluation and Promotions Committee and the Dean.

*Amelunxen v. University of Puerto Rico,* 637 F.Supp. 426, 431 (D.P.R.1986). Amelunxen had been dismissed after she failed to pass the oral thesis examination. She was given a semester to retake and pass the examination, but she failed to do so and was dismissed.

*Hammond v. Auburn,* 669 F.Supp. 1555, 1561 (M.D.Ala.1987). Hammond was dismissed from the engineering program after he failed to earn the required grade point average. He was given an opportunity to improve his grades before the new policy went into effect. His grades did not improve and as dictated by policy he was dismissed from the program.

*Harris v. Blake,* 798 F.2d 419, 424 (l0th Cir.1986). Harris had been dismissed from the counseling education program after he received two failing grades. He claimed the grades were a result of a false letter placed in his file by another professor. The court ruled placing the letter in the file was an appropriate academic procedure.

*North v. Iowa,* 400 N.W.2d 566, 571 (Iowa 1987). North was not readmitted to medical school after receiving treatment for a mental illness. The court ruled the university's actions were not a substantial departure from accepted academic norms.

*Schuler v. University of Minnesota,* 788 F.2d 510, 516 (8th Cir.1986). Schuler was dismissed from a doctoral program in psychology after she failed the qualifying examination. She was given two opportunities to pass the examination and failed each time.

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postsecondary institutions departed from accepted academic norms. In all six cases the students had been treated fairly in accordance with university procedures and had received the required notice prior to their dismissals.

Three other cases[122] involved students who had also been dismissed after experiencing difficulty with university policy. Frederick Haberle[123] not only claimed that the requirement to take a qualifying examination was a substantial departure but also that the procedures used for his dismissal violated his right to substantive due process. Haberle had completed the course requirements for a Ph.D. in chemistry and began working on his dissertation research. He did not take the required qualifying examination before starting his research. Three years later the dissertation committee discovered that he had not passed the examination and required him to take it. He failed the oral portion of the examination twice and subsequently was dismissed from the program.

He claimed the university violated his substantive due process rights by requiring him to take the examination three years into the dissertation research while other students in a similar situation did not have to complete the examination.[124] He also claimed that the graduate committee had waived the requirement for the qualifying examination.

The court did not agree. The evidence proved that all Ph.D. students in chemistry had been required to pass the qualifying examination. One student took the examination four years after completing course work.[125] Thus, Haberle offered no evidence that his treatment was a substantial departure from the academic procedures followed at the university.

In *Crook*,[126] the student claimed the university violated his right to substantive due process after revoking his degree. The university discovered that he had fabricated his research data and proceeded to revoke his master's degree. Before taking official action, Crook was invited back to campus to replicate his study on the university science equipment. He failed to reproduce the results and also failed to use the equipment for a long enough time period to produce the necessary research data.

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[122] *Crook v. Baker*, 813 F.2d 88 (6th Cir.1987); *Eiland v. Wolf*, 764 S.W.2d 827 (Tex.Ct.App.1989); and *Haberle v. University of Alabama in Birmingham*, 803 F.2d 1536 (11th Cir.1986).

[123] *Haberle v. University of Alabama in Birmingham*, 803 F.2d 1536 (11th Cir.1986).

[124] *Id.* at 1540.

[125] *Id.*

[126] *Crook v. Baker*, 813 F.2d 88 (6th Cir.1987).

Based on the current research and the data from the thesis, the university determined that Crook had fabricated his earlier research and revoked his degree.

The court agreed and ruled, "We find that the Committee not only exercised professional judgment but also that the evidence of fabrication was such that the determination by the Committee was not arbitrary or capricious and therefore substantive due process was not denied."[127]

In the third case, David Eiland[128] had 'been dismissed from medical school after he failed to complete the senior elective. He had experienced difficulty throughout the program and had been on academic probation. The court used the *Ewing* case to determine if the process used to dismiss Eiland was a substantial departure. In finding that Eiland had not been denied substantive due process, the court agreed that the faculty had used professional judgment.

In eight cases[129] the courts ruled that the postsecondary institution did not violate the student's right to substantive due process, but did not use the *substantial departure* language. For example, Christine Paoli claimed the university violated her right to substantive due process after denying her the opportunity to take a required course. She had failed a prerequisite and was not allowed to enroll in the student teaching course.

The university proved that it had not allowed a student who had received less than any grade of 'C' to take the course. Thus, Paoli had been treated the same as other similarly situated students. The court found no evidence that the plaintiff had been treated differently.[130]

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[127] *Id.* at 100.

[128] *Eiland v. Wolf*, 764 S.W.2d 827 (Tex.Ct.App.1989).

[129] *Chisid v. Albany Medical College*, 157 A.D.2d 1019, 550 N.Y.S.2d 507 (1990); *Cosio v. Medical College of Wisconsin*, 407 N.W.2d 302 (Wis.Ct.App.1987); *Lllly v. Smith*, 790 S.W.2d 539 (Tenn.Ct.App.1990); *Mauriello v. University of Medicine and Dentistry of New Jersey*, 781 F.2d 46 (3rd Cir. 1986); *Ochsner v. Board of Trustees of Washington Community College*, 61 Wash.App. 772, 811 P.2d 985 (1991); *Paoli v. University of Delaware*, 695 F.Supp. 171 (D.Del.1988); *Soong v. University of Hawaii at Hilo*, 72 Haw. 586, 825 P.2d 1060 (1992); and *Susan M. v. New York Law School*, 76 N.Y.2d 241, 557 N.Y.S.2d 297, 556 N.E.2d 1104 (N.Y.1990).

[130] *Paoli v. University of Delaware*, 695 F.Supp. 171 (D.Del.1988).

In *Susan M.*,[131] the student claimed the grading procedures were unfair and in violation of her right to substantive due process. New York's highest court did not rule on the grading procedures but stated that courts should not interfere in academic decisions:

> [T]o so involve the courts in assessing the propriety of particular grades would promote litigation by countless unsuccessful students and thus undermine the credibility of the academic determinations of educational institutions. We conclude, therefore, that, in the absence of demonstrated bad faith, arbitrariness, [or] capriciousness . . . a student's challenge to a particular grade or other academic determination relating to a genuine substantive evaluation of the student's academic capabilities, is beyond the scope of judicial review.[132]

In two cases, *Alcorn v. Vaksman* [133] and *Branum v. Clark*,[134] the courts ruled in favor of the students. Fabian Vaksman was dismissed from a graduate program in history. This came as a shock as he was unaware that the university was considering his dismissal prior to receiving the dismissal letter. He claimed that the university violated his state and federal rights to substantive due process. Even though the court did not state that the procedures used to dismiss Vaksman were a "substantial departure from accepted academic norms,"[135] it determined that the university had acted in bad faith and did not follow *any* procedures. The court noted that three professors testified that Vaksman's dismissal was improper and that it was not based on academic grounds.[136]

In *Branum v. Clark*[137] Gregory Branum enrolled in the Ph.D. program in mathematics after he completed the masters degree. He began the course work and attempted to find a research advisor to guide him through the dissertation process.

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[131] *Susan M. v. New York Law School*, 76 N.Y.2d 241, 557 N.Y.S.2d 297, 556 N.E.2d 1104 (N.Y.1990).

[132] *Id.* at 1107.

[133] 877 S.W.2d 390 (Tex.Ct.App.1994).

[134] 927 F.2d 698 (2nd Cir.1991).

[135] *Alcorn v. Vaksman*, 877 S.W.2d 390, 397 (Tex.Ct.App.1994) (citing *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225, 106 S.Ct. 507, 513, 88 L.Ed.2d 523 (1985)).

[136] *Id.*

[137] 927 F.2d 698 (2nd Cir.1991).

After five years he found an advisor and was recommended for admission to candidacy. Before being admitted to candidacy the Graduate Committee required Branum to take closed book examinations, a process used only for Branum. He filed a grievance, but a hearing was never held. The Examination Committee was appointed, but the exam did not take place. One year after being recommended for degree candidacy, Branum received a letter from the Vice Provost for Graduate Studies dismissing him from the doctoral program. According to the facts, "Branum had received no prior notice or opportunity to be heard with respect to his dematriculation."[138] Branum filed a grievance and a hearing committee was appointed to review the case. Branum's request for reinstatement was unsuccessful and he brought suit against SUNY-Binghamton for violation of substantive due process.

The district court granted summary judgment in favor of the university.[139] Branum appealed and the court of appeals ruled in his favor and remanded the case. The court noted, "The district court appears to have ignored the complaint's assertion that defendants revived for Branum, and only for Branum, a precondition [the closed book examinations] abandoned a decade earlier as unsound, thereby permitting an inference of some nonacademic motivation."[140] Such a picture of the behavior of university officials presented a possible substantive due process violation that required resolution at trial.

## CONCLUSIONS

Considering all of the adverse academic decisions that are made on postsecondary campuses annually, fifty-nine reported cases over seventeen years is hardly a significant number of cases. If one thinks about the number of adverse grades given annually and the number of adverse program decisions made, fifty-nine is a very small number. Faculty are either doing things right or students are unable to get through the courthouse door.

But, it appears from the amount of due process students have received that administrators and faculty have spent extensive resources and time trying to avoid court challenges in relation to adverse academic decisions and many times provided students with far more due process than required by law. The lower courts have only interfered when a decision clearly has appeared to be unfair or a substantial departure from accepted academic norms.

In this study, the philosophy of judicial nonintervention was rousingly affirmed. As stated in *Horowitz*, the courts "decline to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship."[141] Actually, postsecondary institutions have gone well out of their way to be fair to students involved in adverse academic decisions.

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[138] *Id.* at 701.

[139] *Id.* at 705.

[140] *Id.*

Also to be appreciated is how the Supreme Court deviated from the traditional due process inquiry in both *Horowitz* and *Ewing*. What if the Supreme Court in *Horowitz* and *Ewing* had ruled that no property or liberty rights existed? The Supreme Court simply could have ended the analysis and no procedural or substantive process would be due. Legally speaking, life might be simpler for faculty and administrators.

However, the Court assumed that Horowitz and Ewing had property and liberty rights, so students have continued to bring suits claiming property and liberty rights to education and to future careers. Courts have gone forward with the due process analysis even when there was no finding of deprivation of a property or liberty right. Thus, time and money have been spent on a process that is not required. And yet, the students have continued to lose.

As long as institutional procedures look fair and notice of the academic rules is provided, then no additional procedural due process is required. According to the findings, it looks as if it is as or more important to look legal than to be legal! Could this explain why practitioners and legal professionals have continued to suggest providing students with more due process than required by law? Are practitioners trying to look legal or actually be legal?

If one follows the court decisions since *Horowitz* and *Ewing*, only minimal process is due to students affected by adverse academic decisions. *Horowitz* presented a clearer picture of what due process, specifically notice, means. After *Horowitz*, notice has two meanings, (1) notice of the charges and details related to the hearing, and (2) notice of the academic rules and performance deficiencies. The second type of notice is the *Horowitz* type of notice because the Supreme Court ruled a hearing was not required.

Since there is no set formula for providing the required notice -- the notice of the academic rules, educators need to make sure catalogs and course syllabi include information addressing the academic rules and that procedures include provisions to notify students of deficiencies or state that students are required to track their own progress. The research demonstrated that administrators and faculty who do this are insulated from successful due process challenges. This applies especially to administrators and faculty from professional (health, law, etc.) programs because most students who have filed suit were enrolled in professional academic programs. Even though these students filed most of the suits, they continued to lose.

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[141] *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 90, 98 S.Ct. 948, 955, 55 L.Ed.2d 124 (1978).

Also, the lower courts have not required postsecondary institutions to provide hearings when deciding adverse academic decisions. During a presentation of the findings of this study at a conference, a participant suggested that students are receiving a "hearing" when they take an examination or complete the course requirements.[142] Because students have been notified of the academic rules and know the requirements, the participation in the examination or completion of course requirements serves as an opportunity to perform and to be heard. This concept has not been discussed by the lower courts or by commentators but it could serve as one explanation why the lower courts have continued not to interfere in academic affairs.

The cases reviewed above demonstrate that administrators and faculty members would be wise to adopt academic due process policies consistent with the requirements of *Horowitz* and *Ewing*. But, even though the lower . courts have continued to support and follow the decisions from *Horowitz* and *Ewing*, educators and legal scholars have recommended providing more due process than required by law. At best, this is confusing to administrators who are responsible for developing policy in the ideal interest of the institution and the students. At worst, administrators spend time and other resources providing due process that is not required. This may be because administrators and faculty want to be fair and friendly to students, or make an effort to look fair, or it may represent ignorance of the law.

Administrators who provide for more due process than required must be aware of the legal risks to the institution. Institutions may be more vulnerable to litigation if "generous" due process procedures are not followed appropriately. For example, steps may be overlooked, deadlines may be missed, or misinterpretations may occur, providing students additional opportunities to challenge the proceedings

In conclusion, the lower courts in the fifty-nine cases since *Horowitz* and, *Ewing* deferred to the expertise of educators when dealing with academic decisions. In the five instances where the lower courts ruled in favor of the students, the institutions appeared to be unfair. The courts will not interfere if, as required in *Horowitz*, students have notice of the academic rules, and as required in *Ewing*, postsecondary policies, processes, and practices are not substantial departures from accepted academic norms.

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[142] E.Wedlock, Remarks at the Meeting of National Organization on Legal Problems of Education 41st Annual Conference (November 18, 1995).

# ACADEMIC HONOR CODES: A LEGAL AND ETHICAL ANALYSIS

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Don Wiesner[**]

## INTRODUCTION

> Nor ought we to pay regard to those who exhort us that as [persons] we ought to think human things and keep our eyes upon mortality: nay, as far as may be, we should endeavor to rise to that which is immortal, and live in conformity with which is best, in us.[1]
>
> —Aristotle

The past few decades has seen a rise in the use of ethical codes[2] and an increased focusing on ethics[3] within academics[4] and in the business

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[1] E. HAMILTON, THE GREEK WAY 46-47 (1991). The Greeks' study of philosophy and ethics was fostered by the importance that they attached to the human mind. "The fun fact about the Greek was that he had to use his mind . . . . The Greeks, said 'All things are to be examined and questioned. There is no limits to thought.'" *Id.* at 36-37.

[2] "Ethical Code" is a more generic term that encompasses any code which sets standards for ethical conduct for an intended class of persons. These codes may mandate certain types of actions or prohibit others, or they may be inspirational in character (i.e. nonmandatory). Examples of such codes include: University or Student Honor Codes, Professional Ethical Codes, and Corporate Ethics Codes. Ethics codes are generally based upon the values or ethics of the society in which the group or association is situated. "Ethics has sometimes been [broadly] defined as the clarification of what constitutes human welfare and the conduct necessary to promote it." G. Laczniak & J. Naor, *Global Ethics: Wrestling With the Corporate Conscience*, BUS., Sept. 1985, at 3 (citing E. Clasen, *Marketing Ethics and the Consumer*, HARV. BUS. REV., Jan.-Feb. 1967, at 79.).

[3] The implementation of ethics courses in business and law schools and the establishment of specialized journals (e.g., JOURNAL OF BUSINESS ETHICS, GEORGETOWN JOURNAL OF LEGAL ETHICS, etc.) dealing specifically with issues of ethics and teaching are but two examples. Another example is the "character" component of professional licensing. *See* D. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985) (study of bar examiners' "certification of character"); *see also* THE BAR EXAMINERS' HANDBOOK (2d. ed. 1980). Beginning in 1982, the Multi-State Bar Examination included a separate, required ethics exam, "The Professional Responsibility Exam" as mandated by the American Bar Association and the National Conference of Bar Examiners.

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world.[5] There seems to be renewed interest in the importance of teaching ethics and in living by a "code of honor." This is likely a reaction to the belief of many that our society has been in an ethical free-fall. Signs of moral decay can be seen everywhere: the rise in crime,[6] the notoriety of the insider trading scandals of the 1980's,[7] and the proliferation of civil litigation.[8] A number of causes for this so-called "moral decay" have often

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[4] In 1974, the American Assembly of Collegiate Schools of Business (AACSB) "modified its Curriculum Standards to include 'ethical considerations' within its common body of knowledge requirements." All business schools must satisfy this ethics requirement in order to be accredited by the AACSB. Thus, business schools must establish separate ethics courses or integrate ethics into existing courses. J. Harris, *Ethical Values and Decision Processes of Business and Non-Business Students: A Four-Group Study*, 9 J. LEGAL STUD. ED. 215, 216 (1991); AMERICAN ASSEMBLY OF COLLEGIATE SCHOOLS OF BUSINESS, ACCREDITATION COUNCIL POLICIES AND STANDARDS 27 (1987-88). *See also* Castro, *Business Ethics and Business Education: Report from a Regional State University*, 8 J. BUS. ETHICS 479 (1989).

[5] "Ethical codes have proliferated in recent years. Not only are they issued by professions, but they have often been adopted by corporations, by businesses and by industries across corporate lines." R. DEGEORGE, BUSINESS ETHICS 389 (3d ed. 1990). One commentator concluded that the frequency of stories involving such unethical behavior as fraud, price-gouging, and pollution, has resulted in "[c]orporations . . . rushing to adopt codes of ethics [and] [b]usiness schools are scrambling to add ethics courses." J. Byrne, *Businesses Are Signing Up For Ethics 101*, BUS. WK., Feb. 15, 1988, at 56.

[6] For example, in 1981, 30% of all households had been "touched with crime." U.S. Bureau of Justice Statistics, HOUSEHOLDS TOUCHED BY CRIME (1990) as reported in the STATISTICAL ABSTRACT OF THE UNITED STATES 180 (111th ed. 1991). Also, prison population has increased from 196,429 in 1970 to 738,894 in 1990. *Federal and State Prisoners*: 1960–1990 Table 329.

[7] "Recent scandals on Wall Street and the subsequent prosecution of inside traders have heightened this nation's attention on the morality of business." Harris, *supra* note 4, at 215. *See also* James, *The Crisis of American Business*, 1 J. BUS. ETHICS 285 (1982). *See also* M. Magnet, *The Decline and Fall of Business Ethics*, FORTUNE, Dec. 8, 1986, at 65. "Not that Boy Scouts have always run American business . . . the business climate has become less ethical than it was in the relatively above board period from the Depression's end until the mid-Seventies." *Id.* The ethics of the legal profession, one of the so-called "learned professions" was also called into question. "The profession has recently emerged from the anything-goes roaring eighties, and all of society has been seriously injured by what has taken place. The time is ripe to reassess the ethics rules that guide attorney conduct." S. Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEGAL ETHICS 149, 152 (1993).

[8] Some have argued that this proliferation in litigation is at least partially due to the fact that we are a country with approximately one lawyer per 360 persons. That being more than twenty times more attorneys per capita than the country of Japan. "Japan has one lawyer for every 9300 people, compared to the United States, which has one per 360." R. B. SCHAFFER, ET AL., INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT 210 (2d ed. 1993). For example, liberalization of our bankruptcy laws has seen a rise in personal bankruptcies from "287,463 in 1980 to nearly a million" in 1992. In fact, "[s]ince the law was liberalized 15 years ago, one in every 14 households has used the courts to make . . . its debts disappear." *The Bankruptcy Bonanza!*, MONEY MAG., Aug. 1993, at 82. In defense of the legal profession, it can be argued that attorneys are only responding to a demand for their services by a society

been cited. The disintegration of the family unit,[9] the decline of the "Puritan Work Ethic",[10] and the blind focus on the monetary bottom line in business[11] are but three.

Some have begun to look to our institutions of higher learning to help fill the ethical void. The response to this call has been two-fold. First, an increase in the formal instruction of ethics outside its traditional domains of philosophy and theology has occurred.[12] Formal instruction in ethics has expanded to our schools of business,[13] engineering, law,[14] and medicine.[15]

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characterized by an extensive regulatory environment, a myriad of consumer protection laws, and a sophisticated, educated population fully aware of its individual and consumer rights. Pro-consumer components of U.S. law include: (1) the strict liability cause of action in the area of products liability; (2) treble-damages provisions found in our antitrust laws (Sherman Antitrust Act, 15 U.S.C.A. §§ 1 to 7 and Clayton Antitrust Act, 15 U.S.C.A. §§ 12 to 27); (3) Implied warranties in the sale of goods (*See, e.g.*, U.C.C. § 2-314 (Implied Warranty of Merchantability) and § 2-315 (Implied Warranty for a Particular Purpose). *See also* Magnuson-Moss Warranty Act, 15 U.S.C.A. §§ 45, 46, 49, 50, 52 (1975) (warranties on consumer products); (4) Fair Trade Commission Act, 15 U.S.C.A. § 57b–1 (unfair or deceptive acts or practices in advertising); (5) Truth in Lending Act, 15 U.S.C.A. § 1601 *et seq*. and Equal Credit Opportunity Act (ECOA), 15 U.S.C.A. § 1691 *et seq*. (consumer credit transactions); and (6) state consumer protection laws, e.g., new home warranty laws, "lemon laws," etc.

[9] The rise of single-head households has been dramatic. The percentage change of male householders increased by 41% from 1970 to 1980 and an additional 66% from 1980 to 1990. The percentage of change for female householders increased 58% from 1970 to 1980 and an additional 25% from 1980 to 1990. U.S. Bureau of the Census, *Current Population Reports*, Series P-20, No. 458, STATISTICAL ABSTRACT OF THE UNITED STATES, 45 (111th ed. 1991). Births to unmarried women increased 28.3% from 1980 to 1989 (262,800 to 337,300). U.S. National Center for Health Statistics, *Vital Statistics of the United States*, STATISTICAL ABSTRACT OF THE UNITED STATES 66 (111th ed. 1991).

[10] *See* DEGEORGE, *supra* note 5, at 378. The so-called work ethic, sometimes inaccurately labeled the "protestant work ethic," emphasized the work in and of itself was virtuous and that one will be rewarded for his or her efforts. For a discussion of the "fallacy" of the work ethic, see W. SHAW, BUSINESS ETHICS, 14–42 (1991).

[11] The infamous Pinto automobile exploding gas tank (products liability) case is an example of how the economic equation won out over the human equation with the most disastrous results. *See* R. CORLEY, ET AL., THE LEGAL AND REGULATORY ENVIRONMENT OF BUSINESS 213 (9th ed. 1993).

[12] *See generally* Ethics Resource Center, Inc., *Ethics Education in American Business Schools: A Study of the Content and Scope of Ethics Education in the Nation's Accredited Graduate and Undergraduate Business School Programs* (1988). "Teaching ethics in business schools is no longer the novel idea it once appeared to be. *Ninety percent* of the business schools responding to a recent . . . survey indicate that ethics is included in the curricula." *Id*. at 1 (emphasis added).

[13] *See supra* note 4 and accompanying text. The effectiveness of teaching ethics at the university level has been studied and will not be addressed in this article. *See generally* Purcell, *Do Courses in Business Ethics Pay Off?*, 19 CALIF. MGMT. REV. 50 (1977); Miller & Miller, *Its Too Late for Ethics Courses in Business*, 17 BUS. & SOC'Y REV. 39 (1976); Konrad, *Are Business Ethics Worth Studying?*, 27 BUS. & SOC'Y REV. 54 (1978). *See* Harris, *supra* note 4,

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Second, the use of an old idea,[16] the "Honor Code," has been used anew in an attempt "to encourage consistent ethical behavior"[17] within the university environment.[18] It is the hope that the Honor Code will instill a "commitment to honesty and personal integrity"[19] in our students. However, the recent cheating scandal that has shaken the United States Naval Academy has again called into question the usefulness of such codes.[20]

This article will focus on a number of issues pertaining to University Honor Codes: the purposes of codes;[21] the responsibilities of the different actors within the university setting;[22] and the requirement of fairness, the so-called due process concerns in the enforcement of codes. These issues will be analyzed by comparing University Honor Codes[23] with Corporate Ethics Codes.[24] This comparative corporate analysis[25] will be expanded to

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at 216, nn.12-14.

14. *Supra* note 3.

15. One of the oldest of all professional ethical codes is found in the profession of medicine. The 'Hippocratic Oath' sworn to by all new physicians is attributed to the Greek philosopher, Hippocrates.

16. For example, the United States Military Academy Honor Code dates back to the very founding of the Military Academy in 1802. "The original Honor Code was actually an extension of the 'Code of Honor' then prevalent in the officer corps of the U.S. Army." J. Beasley, *The USMA Honor System—A Due Process Hybrid*, 118 MIL. L. REV. 187, 189 (1987).

17. UNIV. OF MIAMI, UNIVERSITY OF MIAMI UNDERGRADUATE STUDENT HONOR CODE 1 (1986).

18. It is the use of student or academic honor codes that will be the focus of this article.

19. UNIV. OF MIAMI, *supra* note 17.

20. "An investigation into one of the largest cheating scandals ever at the United States Naval Academy will implicate about 125 midshipmen, or about 15 percent of this year's class . . . ." Eric Schmitt, *An Inquiry Finds 125 Cheated on a Naval Academy Exam*, N.Y. TIMES, Jan. 13, 1994, at A2.

21. Honor systems can be divided into three "types:" (1) "strict honor code system," (2) "strict security system," and (3) "the mixed system." The type of system enacted is likely to be interrelated with the stated or perceived purpose of the honor code or honor system. *See infra* part I.A.

22. The actors or principals include: the students (the violators, the innocent bystanders, and the student body in general), the Honor Council or Review Board, the professor teaching the course, the faculty in general, and the school administrators (including the Board of Trustees).

23. For purposes of analysis, we have selected three Honor Codes to examine. The selected codes to be studied are those from the University of Miami, the University of Virginia, and the United States Military Academy.

24. There has been a tremendous rise in the growth of corporate ethics codes. "[A]pproximately 90 percent of *Fortune 500* firms and almost half of all companies have codes in place." P. Murphy, *Implementing Business Ethics*, 7 J. BUS. ETHICS 907, 908 (1988) (citing Center for Business Ethics, *Are Corporations' Institutionizing Ethics?*, 5 J. BUS. ETHICS 85 (1986)). One commentator attributed "Watergate and passage of the Foreign Corrupt Practices Act in 1977 . . . [for] the tremendous growth and popularity of corporate ethical codes." B. Stevens, *An Analysis of Corporate Ethical Code Studies: Where Do We Go From Here?*, 13 J. BUS. ETHICS 63 (1994).

(1) analyze the roles of the different "players"[26] in the implementation of honor codes and (2) analyze and compare corporate "whistle blowing"[27] to the self-policing of Honor Codes by way of its nontoleration provisions.[28] Professor DeGeorge's five conditions when corporate whistle blowing is "morally required" will be applied to the academic setting.[29] Also, an analysis of viewing the "job" of being a student as a profession will be performed. That is, should students be held to a higher standard than is required of the public in general? Finally, the application of the Honor Code to a specific example, that of academic testing, will act as a sort of ethical case study.[30] This exercise will raise issues and concerns discussed in the article in the context of a specific hypothetical.[31]

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25. The traditional roles played by the actors in a typical public corporation will be compared to the different players in a typical university. Even though most universities are "not-for-profit" corporations, they are rarely subjected to a typical corporate analysis. For example, we will analyze the roles of the students as being akin to the role of "shareholders" in a corporation. *See supra* note 22 and accompanying text.

26. The "players" and their public corporate equivalents will be viewed as follows: (1) Board of Trustees (Board of Directors), (2) President, Deans, Provosts (chief executive officer and other corporate officers), (3) Professors (quasi-employees), and (4) Students (shareholders). *See infra* notes 112-118 and accompanying text.

27. "Whistle blowing" is often used to refer to the disclosure by an employee of improper conduct or activities within a company. It can be "internal whistle blowing," whereby the employee discloses the information to a superior or to someone within the company. However, whistle blowing is more popularly associated with an employee making public information about improper conduct within his company (e.g., disclosing the information to the news media).

28. "Nontoleration" refers to the obligation of students to report any violations of the Honor Code. If a student fails to report a violation, then she or he too will be considered to have violated the code. "If he does not do so, he too is violating the Honor Code." Beasley *supra* note 16, at 192. It is the purpose of the nontoleration clause to insure compliance with the code by "forcing" students to self-police it or suffer the consequences.

29. DE GEORGE, *supra* note 5, at 208-14.

30. *See infra* appendix A.

31. The term "case study" in the text is not intended to impart the notion of an empirical study. Dr. Morrow's exam in appendix A is only intended as a hypothetical example or study. However, it is a composite of a number of reported cases and the authors' own experiences.

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## AN OLD IDEA REVISITED

Ethical codes[32] have a long and storied history[33] that literally dates back to the beginning of civilization.[34] Academic honor codes,[35] also, have a long history. For example, the West Point Military Academy Honor Code traces its ancestry to the founding of the Academy in 1802.[36] More recently, colleges and universities have begun to look anew at the purpose and the effectiveness of such codes.[37] This is likely due to a heightened awareness of the importance of instilling ethical values upon our students. This "new" look has included revisions of honor codes,[38] a reappraisal of existing honor codes,[39] and for some institutions, the initial enactment of an honor code.[40] We now turn to a review of the proposed purposes of honor codes.

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[32] Definition of Ethical Codes:

> Ethical codes are statements of norms and beliefs of an organization. Norms . . . are standards of behavior . . . . The norms in an ethical code are generally expressed as a series of negative statements, for it is easier to list things a person should not do, than to be precise about the things a person should do. The beliefs in an ethical code are standards of thought . . . . Consequently, they are expressed in a positive form.

L. HOSNER, MANAGERIAL ETHICS AND ORGANIZATIONAL DESIGN 153, 154 (1987).

[33] The importance of good moral character and the importance of living by way of an "honor code," whether personal, professional or as a student, has a long history. For example:

> Moral character as a professional credential has an extended historical lineage. For lawyers, the requirement dates to the Roman Theodesian Code, and its Anglo-American roots reach to thirteenth century England. In this country, every state bar currently makes certification of character a prerequisite for practice, and *most other nations and licensed professions* impose a similar mandate.

D. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 493 (1985) (emphasis added).

[34] *Supra* note 15.

[35] For the purposes of this article "honor code" will be used to refer solely to academic ethical codes. The terms ethical and honor are often used interchangeably. For example, a company may name its corporate ethics code an "honor code."

[36] *See* Beasley, *supra* note 16.

[37] "The vote comes as ethical systems have been the focus of debate at U.S. universities." *University of Virginia Students Vote to Keep Strict Honor Code*, MIAMI HERALD, Mar. 5, 1994, at 18A.

[38] *See* Beasley, *supra* note 16 (revision of United States Military Honor Code in 1970 to include a nontoleration clause); "[The University of] Delaware revamped its honor code in 1985 . . . . Students who are caught cheating at Delaware now receive a grade of XF on their transcripts." M. Collison, *Apparent Rise in Students' Cheating Has College Officials Worried*, CHRON. HIGHER ED., Jan. 17, 1990, at A33.

## I. PURPOSES: "THE QUEST . . . TO REACH THE UNREACHABLE STAR?"[41]

The purpose of ethical codes in general and academic honor codes in particular, can best be examined by looking directly at the Codes. For example, the following is from a section of a university honor code, aptly titled "Purpose":

> This Honor Code is established . . . to protect the academic integrity of the University . . . , to encourage consistent ethical behavior among . . . students, and to foster a climate of fair competition . . . . While a student's commitment to honesty and personal integrity is assumed and expected, this Code is intended to provide an added measure of assurance that in fulfilling the University's requirements, a student's work will never involve falsification, plagiarism, or other deception . . . .[42]

A separate "Guide" for faculty and administrators states that "[t]he Honor Code provides standards which are necessary to maintain a community where one has the right to compete fairly in the classroom."[43]

A remarkable similarity can be seen with some professional, corporate, and industry ethical codes.[44] One industry code states a similar agenda in its "Preamble." It states that members of the association have a "common responsibility for its integrity and honor . . . competency, fairness, and high integrity resulting from adherence to a lofty ideal of moral conduct in business relations."[45] The Professional Engineers' Code provides that the services provided by its members "require honesty, impartiality, fairness, and equity . . . ."[46]

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[39] See, for example, the recent vote of the student body, by a 3 to 1 margin to retain the University of Virginia's 152-year old honor system, as is. It is considered "among the oldest and strictest in American universities." The vote preserved the "expulsion-only honor code." *See supra* note 37. See generally recent recommendations being forwarded to revise the honor system at the United States Naval Academy in the wake of the 1992 cheating scandal. A civilian panel headed by Richard Armitage, a former Defense Department official, (popularly referred to as the Armitage Committee or Panel) has made a number of recommendations to revise the Naval Academy Honor System. For example, the Panel recommended the appointment of an Academy Honor Officer with at least the rank of Captain. It also recommended a ban on giving the same exam more than once. *See* Schmitt, *supra* note 20, at A1.

[40] For example, the University of Miami enacted its Honor Code in 1986. *See* UNIVERSITY OF MIAMI, *supra* note 17. "[T]he university senate at Maryland approved an academic honor code . . . that requires students to sign a pledge not to cheat and encourages them to turn in others who they believe have cheated." *See Collison, supra* note 38, at A33.

[41] MIGUEL DE CERVANTES, DON QUIXOTE (*Man of La Mancha*).

[42] *See* UNIV. OF MIAMI, *supra* note 17.

[43] UNIVERSITY OF MIAMI, UNIVERSITY OF MIAMI HONOR CODE: A GUIDE FOR FACULTY AND ADMINISTRATORS (1993). [hereinafter GUIDE FOR FACULTY]

[44] For an example of an industry ethics code, see P. Murphy, *Implementing Business Ethics*, 7 J. BUS. ETHICS 907, note 6 (1988) (quoting *The Defense Industry Initiative on Business Ethics and Conduct*).

A famous honor code, the United States Military Academy Cadet Honor Code, simply states: *A cadet will not lie, cheat, or steal, nor tolerate those who do.*[47] Despite its brevity and seeming simplicity, its purpose, interpretation, and effectiveness have been anything but clear and simple. The Cadet Honor Code exists within a more complex "Honor System." "While the fundamental statement of the Honor Code has changed very little since the early 1900's, the Honor System is an ever-evolving process that has undergone some rather drastic changes."[48] For example, a number of recent court cases have focused on the procedural due process issues pertaining to the enforcement of the Honor Code.[49]

Furthermore, the purpose of the Military Academy Honor Code has never been clearly stated. One purpose of the Code has been stated "as a primary means [for] achieving . . . character development."[50] The establishment of educational programs under the Honor System seems to support this statement of purpose.[51] However, it has also been clearly noted that the purpose of the nontoleration clause addition in 1970 ("nor tolerate those who do") was that it was "no part of the function of West Point to become a reformatory of morals."[52] Thus, another or alternative purpose of the Honor Code is that of regulation. It is to be used to "weed out" and expel those of poor moral character. It is not intended to educate or to rehabilitate.

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[45] National Association of Realtors, Code of Ethics and Standards of Practice, Preamble (1994).

[46] National Society of Professional Engineers, Code of Ethics (1992).

[47] United States Military Academy Press, Honor Guide for Officers 4 (1958); *see* Beasley, *supra* note 16. Although the Academy Cadet Honor Code contains only thirteen words, the current version is the product of three formal revisions (additions). *Id.* at 189-91. The United States Air Force Academy has adopted the same code. Birdwell v. Schlesinger, 403 F. Supp. 710, 714 (D. Colo. 1975).

[48] Beasley, *supra* note 16, at 187.

[49] Rustad v. United States Air Force, 718 F.2d 348 (10th Cir. 1983) (Air Force Academy); Andrews v. Knowlton, 509 F.2d 898 (2d Cir. 1975) (United States Military Academy); Hagopian v. Knowlton, 470 F.2d 201 (2d Cir. 1972) (United States Military Academy); Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967) (Merchant Marine Academy); Birdwell v. Schlesinger, 403 F. Supp. 710 (D. Colo. 1975) (Air Force Academy); Roberts v. Knowlton, 377 F. Supp. 1381 (S.D.N.Y. 1974) (United States Military Academy).

[50] *See* Beasley, *supra* note 16. Character development includes the qualities of "strong character, unimpeachable integrity, and moral standards of the highest order." *Id.* at 187.

[51] *Id.*

[52] *Id.* at 192 (citation omitted).

It seems that the regulatory purpose has won out over the educational one. Over the years the "spirit" of honor underlying the Code has been replaced by extensive rule-making.[53] Instead of promoting the independent thinking of the student to determine what is honorable under the Code in a given situation, the student's concern is focused upon whether the conduct is specifically prohibited under the "rules." One commentator noted that "[t]his tends to obscure the spirit of the Code and exacerbate the conflict . . . between honor and regulations."[54]

### A. The Educational Function of Honor Codes

The purpose of honor or ethical codes can generally be divided into two areas: (1) educational and (2) regulatory.[55] For example, the University of Miami Honor Code states both purposes. First, educationally "to encourage consistent ethical behavior."[56] Second, "to protect the academic integrity of the University."[57] It then enumerates examples of scholastic dishonesty such as "cheating, plagiarism, collusion, the falsification or misrepresentation of experimental data."[58]

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[53] *Id.* at 193.

[54] *Id.* (citation omitted). This concern with violating specific rules has seemingly undermined student confidence in the Honor System. A 1975 survey found that "*sixty percent* of the Corps felt that cadet adherence to the spirit of the Honor Code was deteriorating" and "*seventy percent* of the cadets denied that the Honor Code was uniformly adhered to . . . ." *Id.*

[55] One commentator has used three classifications for professional codes: "aspirational, educational, or regulatory. The first classification states ideals to which practioners should do, the second enhances understanding through commentary and the third provides a detailed set of rules." Stevens, *supra* note 24, at 63 (citing M. Frankel, *Professional Codes: Why, How, and With What Input?*, 8 J. BUS. ETHICS 109 (1989)). For purposes of this article, we have elected to quantify the purposes of honor codes into two areas: educational and regulatory. We will deal with the aspirational aspects of honor codes in our discussion of the educational function of codes. In short, we believe it is the educational purpose of honor codes to educate students in both the mandatory level of conduct and related rules, but also, to educate the student in aspirational ideas and general ethical concepts.

[56] *See* UNIV. OF MIAMI, *supra* note 17.

[57] *Id.*

[58] *Id.* A GUIDE FOR FACULTY AND ADMINISTRATORS attempts to define some areas of academic dishonesty. Furthermore, it gives a list of examples for each area. For example, the following are given as examples of "fabrication:"

1. Citation of information not taken from the source indicated.
2. Listing sources in a bibliography not used in the academic exercise.
3. Inventing data or source information for research of other academic exercise.
4. Submitting as your own any academic exercise prepared totally or in part by

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One question is whether a viable Honor Code should be primarily regulatory, primarily educational, or both? It would seem that a viable code would possess qualities of both regulation and education. It should be educational because one of the goals of schools of higher education is to graduate "good citizens."[59] A diploma should represent a minimum level of competency which has been honestly and ethically obtained. Honor Codes should, thus, be supplemented by an educational support system.

### 1. *The Honor Code as an Ethical Tool of Instruction*[60]

The educational support system should serve two functions. First, the code should educate students on potential "ethical gray areas" to prevent[61] "inadvertent" ethical violations.[62] Second, it should provide fair notice as to what is to be expected of entering freshmen as to the university's or college's standards of conduct. The idea that an Honor Code should provide guidance in so-called ethical "gray areas," was aptly stated by one commentator as follows:

> [B]e specific and honest. A code that simply says that its members should not lie, steal, or cheat requires nothing of them that is not required by others. If a code is honest, it deals with those aspects of the profession [or

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another.

5. Taking a test for someone else or permitting someone else to take a test for you.

GUIDE FOR FACULTY, *supra* note 43.

[59] *See infra* notes 72-73 and accompanying text.

[60] The indoctrination of persons with certain "core values" in order to produce the desired ethical behavior was described by one commentator as "the enculturation process." "The enculturation process instills the core values into each individual and integrates ethical and socially responsible concerns . . . ." D. Robin & R. Reidenbach, *Social Responsibility, Ethics, and Marketing Strategy: Closing the Gap Between Concept and Application*, 51 J. MARKETING 44 (1987).

[61] Prevention will hopefully be the end result of the educational support system. Honor Code education is an attempt to appeal to the student's ethical predispositions in the face of unethical dilemmas or temptations. As one commentator argues in the area of managerial ethics: "Let us consider prevention first, for there are two widely known means—ethical codes and ombudsman . . . ." L. HOSNER, THE ETHICS OF MANAGEMENT: MANAGERIAL ETHICS AND ORGANIZATION DESIGN 153 (1987). The concept of "ombudsman" will be discussed later in this article. *See infra* notes 320-21.

[62] One may argue that a high standard of ethics and academic honesty should be assumed and need not be explained. For example, the University of Miami Honor Code specifically states that "a student's commitment to honesty and personal integrity is assumed and expected." *Supra* note 17. However, it seems that if a university or college is committed to educating "good citizens" and increasing the effectiveness of their Honor Codes, every reasonable attempt to educate their students on the codes should be undertaken.

> those of student] that pose particular and specialized temptations to its members.[63]

An example of one educational support system which attempts to provide such guidance is the University of Miami Faculty Guide.[64] It attempts to define different areas of academic dishonesty, such as cheating, fabrication, plagiarism, and misconduct.[65] Furthermore, it gives sixteen specific examples of Honor Code violations.[66]

The importance of educational support in the honor system can be analyzed by studying a number of roles which may be affixed to the position of being a student. The analysis will focus on students' status as "citizens" and students' status as "professionals."

### a. Students as Citizens

Numerous ethical codes have specifically expressed the importance of being or becoming "good citizens." This expressed recognition of citizenship is a point oftentimes overlooked. A member of a group, association, company, or profession is first a member of society. "Members of a profession are people first and members of a profession second . . . . Lawyers, for instance, have no right to lie or cheat or mislead in order to help or defend a client."[67] The National Association of Realtors' Code of Ethics and Standards of Practice states that 'REALTORS' should recognize that *the interests of the nation and its citizens* require the highest and best use of the land . . . ."[68] Article II of the American Institute of Certified Public Accountants is titled "The Public Interest."[69] It states as its fundamental principle: "Members should accept the obligation to act in a way that will *serve the public interest* [and] *honor the public trust*."[70] Thus, codes of ethics commonly require that adherents must be good citizens and act in a way that is beneficial to society. This requirement of good citizenship can be expressly stated[71] or implied from other sources.[72]

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[63] DEGEORGE, *supra* note 5, at 388. Note, that Professor DeGeorge's list of requirements were designed for the preparation of professional ethical codes. However, these requirements can also be applied to academic honor codes. In fact, one may argue that academics is a "profession:" a profession that covers both sides of the lectern.

[64] *See* GUIDE FOR FACULTY, *supra* note 43.

[65] *Id.*

[66] *Id.*

[67] DEGEORGE, *supra* note 5, at 382.

[68] NATIONAL ASSOCIATION OF REALTORS, *Code of Ethics and Standard of Practice*, Preamble (1994). The Realtors' Code further states that this interest "impose[s] grave social responsibility and a patriotic duty." *Id.* The word "REALTOR" is a proprietary term indicating membership in the Association.

[69] AICPA, PROFESSIONAL STANDARDS, art. II (1992).

[70] *Id.* at 4301. This principle also requires accountants to "demonstrate commitment to professionalism." *Id.*

This notion of "citizenship" relates well to the educational purpose of academic honor codes. Most would agree that the underlying purpose of our educational system is to benefit society.[73] To benefit our society, our graduates should be both competent and ethical. The University of Miami Faculty Manual[74] states that the University has an obligation to society and to its students to graduate "informed citizens."[75] Furthermore, one of its obligations is "[t]o stimulate the whole person [i.e., the students] including . . . the will to become involved as citizens with self-developed commitments."[76] Therefore, the Academic Honor System should be used as a tool to help educate and train our students to be good citizens.

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[71] For example, the American Marketing Code of Ethics expressly states that "Marketers must . . . make every effort . . . to identify, serve, and satisfy all relevant publics: customers, organizations, and society." AM. MARKETING ASS'N, MARKETING NEWS, Sept. 11, 1987, at 2.

[72] It is implied that it is the obligation of every company to be good a "corporate citizen." E.g., "General Motors takes seriously its commitments as a responsible corporate citizen [and to] our many important constituencies—government officials, business, academic, research and environmental leaders, local community and concerned citizens." GENERAL MOTORS PUBLIC INTEREST REPORT (1991).

[73] "Universities as institutions are created by society; they are nurtured by society; their reason for being is service to society . . . ." UNIVERSITY OF MIAMI, THE FACULTY MANUAL 11 (1985) [hereinafter THE FACULTY MANUAL].

[74] *Id.*

[75] *Id.* at 12.

[76] *Id.*

b. Students as "Professionals"

It is a generally believed that members of a profession[77] are to be held to a higher moral standard than the average citizen.[78] The question is whether students should be held to the minimum ethical obligations, or whether society should expect them to maintain a higher standard of conduct. One can argue that the ethical level of conduct to be maintained by students should be akin to that of a "professional." A number of reasons can be forwarded in support of this analogy.

First, academia can be viewed as a profession. Any of those voluntarily entering the arena of academia whether student, professor, or administrator, should be held to a professional level of conduct.[79] It would be reasonable for students to expect a higher degree of ethical conduct of their professors

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[77] Some have narrowly defined the concept of professions as the traditional "learned professions" of medicine, law, dentistry, architecture, engineering, and possible a few others. More generally, the "profession" label can be affixed to any group of specialized persons that form an association with its own ethical code and normally with a policing apparatus for enforcing the code. Ours is a society characterized by tremendous growth in job and career specialization and a resultant increase in the number of "professions." "As modern society becomes more complex, it requires greater specialization and specialized knowledge . . . . The need for advanced training and the growth of the service professions have encouraged more people to go to college and professional schools." DeGeorge, *supra* note 5, at 382. An example of the proliferation of professions and of ethical codes associated with them can be found in the computer profession. *See, e.g.*, Data Processing Management Association, Code of Ethics and Standards of Conduct; Institute for Certification of Computer Professionals, ICCP Code of Ethics; Association for Computing Machinery, ACM Code of Professional Conduct; Information Technology Association of America, Professional Services Code of Ethics. Interestingly, the Data Processing Management Association provides for student chapters at universities and colleges. In order for a student to become a member of the Association, he or she must accept the 'student code of ethics'. The Code of Ethics requires the student to accept his or her "obligation to my College or University; therefore, I shall uphold its ethical and moral principles." Furthermore, the student must accept his or her "obligation to my country." E. Oz, *Ethical Standards for Computer Professionals: A Comparative Analysis of Four Major Codes*, 12 J. Bus. Ethics 709, 711 (1993).

[78] For example, The "Preamble" to the Lawyer's Code of Professional Responsibility states that "[e]ach lawyer's own conscience *must* provide the touchstone against which to test the extent to which the lawyer's actions *should rise above minimum standards*. Model Code of Professional Responsibility Preamble (1992) (emphasis added).

[79] "Professional level of conduct" is meant to be something above a "minimum level" of ethical conduct. This idea is often segregated as an "aspirational" portion of most professional codes. For example, the Lawyer's Professional Code of Professional Responsibility is divided into three interrelated segments: (1) the "Canons" or axiomatic norms that all lawyers are to follow, (2) the "Disciplinary Rules" or the *minimum level* (mandatory level) of conduct, and (3) the "Ethical Considerations" which highlight the goals and *aspirations* that members should strive to achieve. Model Code of Professional Responsibility (1992); *see also* R. Erlich & S. Makar, *Professionalism, Civility, and Aspirational Conduct*, 68 Fla. B.J. 14 (1994).

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and of their school administrators.[80] Alternatively, it is reasonable for the faculty to expect a reciprocal level of conduct from its students.[81] It is the aspiration of most honor codes that students would expect such a level of conduct from themselves.[82]

Second, one definition of a profession is that "members . . . set their own standards . . . [and] discipline their own members."[83] Student and academic honor codes generally reflect these two functions. First, they set the standards of honesty and academic conduct expected of the student body.[84] Second, most honor codes provide for enforcement and sanctions for violations. Some codes provide for self-policing through the inclusion of a "nontoleration clause."[85] A student is held to violate the honor code if he or she observes a violation of the code and fails to report the misconduct.[86] Thus, academic honor codes generally possess the same monitoring characteristics as found in professional ethics codes and serve similar functions. Third, one of the goals of our institutions of higher education is to educate our youth to be "good citizens."[87] The importance of instilling high ethical standards upon our students is an additional reason to regard the "job" of being a student as professional in nature. Colleges and universities through their honor codes should encourage their members to perform at a level above the perceived "moral minimum."[88]

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[80] Professor DeGeorge acknowledges that "University teaching is probably a profession." DEGEORGE, *supra* note 5, at 383. The level of conduct placed upon professors by their own association is high. Their Code of Ethics states that "their primary responsibility . . . is to seek and to state the truth." AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, STATEMENT ON PROFESSIONAL ETHICS, art. I (1987).

[81] Moral character has been used as an entry criteria for many professions, groups, and associations. *See, e.g.*, Rhode, *supra* note 3 (attorney moral or character requirements for admission to the bar).

[82] In fact, many Student Honor Codes were initiated by the students or their student government. For example, the University of Miami Honor Code "was initiated at the request of the Undergraduate Student Body Government." UNIV. OF MIAMI, *supra* note 17.

[83] DEGEORGE, *supra* note 5 at 383.

[84] *See supra* notes 16 & 17 and accompanying text.

[85] For a definition of "nontoleration clause," see *supra* note 28.

[86] *See supra* note 28.

[87] *Supra* part I.A.1.a.

[88] The term "moral minimum" is often used in both professional and nonprofessional contexts. Disciplinary or mandatory rules are considered the "moral minimum" within a given profession. *See, e.g.*, *supra* note 79. The "moral minimum" in business is generally equated with obeying the law. This notion of the moral minimum is aptly explained in the following corporate ethics code titled *To Reach Beyond the Minimum*. "[T]he sanctions of the law give strong guidance to our behavior, but alone do not inspire our best." THE ETHICS CODE OF BORG-WARNER CORPORATION, TO REACH BEYOND THE MINIMUM. HOSNER, *supra* note 61, at 155. The Caterpillar Tractor Company's Code states that "[t]he law is a floor. Ethical business conduct

### 2. *The Honor System as a Device to Provide Fair Notice*

The second purpose of an educational support system is to provide proper advance notice of what is expected of the student by the student government and by the university or college. From a fairness perspective,[89] it should be difficult for a student to plea ignorance of the code and its contents.[90] If the university expects "to foster a climate of fair competition"[91] among its students, it should emphasize fairness throughout the entire Honor System.

Examples of practical steps to more fully satisfy the "notice function" include the forwarding of a copy of the honor code and explanatory materials upon an applicant's acceptance into the university or college, coverage of the honor code and the honor system at pre-semester orientation, use of a portion of the first class of each freshmen course to review the honor code and answer any questions, and the incorporation of formal ethics instruction somewhere in both the undergraduate and graduate curricula.[92] Some universities expressly deal with the notice issue by

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should normally exist at a level well above the minimum required by law." T. Von der Embse & R. Wagley, *Managerial Ethics: Hard Decisions on Soft Criteria*, 53 SAM ADVANCED MGMT. J. 4 (1988). Another commentator discusses a number of "propositions" that can be used in understanding business ethics. One of his propositions reads, "[p]roper ethical behavior exists on a plane above the law. The law merely specifies the lowest common denominator of acceptable behavior." G. Laczniak, *Business Ethics: A Manager's Primer*, BUS., Jan-Feb. 1983, at 23.

[89] This idea of "fair notice" was expressed by a former Chairperson of the University of Virginia Honor Council. "We build a community of trust through the *first contact* with the applicant to the requirement of a commitment to the Honor Code. This comes as result of some form of education and *fair notice*. At the first convocation the students sign on for this commitment." Conversation with Travis Lewis, Chairman of the Honor Council, University of Virginia, with Professor Anita Cava (Sept. 18, 1990).

[90] The notion of fairness will be addressed more fully in the different context of procedural due process in the enforcement of honor codes. *See infra* part II.

[91] UNIV. OF MIAMI, *supra* note 17. In the corporate world the idea of the importance of fair competition is referred to as the principle of the *level playing field*. "The level playing field principle *seeks to prevent inequities by preventing competitors from using* [unfair] *advantages* . . . ." C. WALTON, CORPORATE ENCOUNTERS: ETHICS, LAW & THE BUSINESS ENVIRONMENT 118 (1992).

[92] Another commentator has stressed the importance of notice and education in the area of corporate and business ethical codes:

> Communication is an essential responsibility if ethical policies are to be executed in *any organization*. Formally, this communication can happen in many ways through the ethical code and seminars; training programs that deal with ethical issues. New employees of most companies are asked to read and sign the ethical code upon their employment.

P. Murphy, *Implementing Business Ethics*, 7 J. BUS. ETHICS 907 (1988) (emphasis added).

making use of the "Honor Pledge."[93] The Honor Pledge is normally a written oath[94] signed by the student pledging not to cheat or violate the honor code. The pledge is sometimes required to be signed upon admission to the university,[95] or is signed prior to the submission of any exam or assignment.[96] These types of steps should prove to be of little inconvenience to an institution committed to making its honor code and honor system as effective as possible.

### B. The Honor Code's Regulatory Function

Professor DeGeorge believes that all professional ethics codes should possess the following characteristics: (1) "The code should be regulative . . . the code should make clear which of its statements are ideals and which are punitively regulative . . . . and (2) the code must be policeable and policed."[97] The educational and regulatory functions of honor codes do not exist in separate and exclusive spheres. It would seem that for honor codes to be effective, these dual functions should be integrated. This interrelationship serves to reinforce each purpose of the code. The educational support process should inform the student that compliance is not some nebulous, voluntary act. Instead, the educational process should make clear that noncompliance will meet with swift and severe repercussions.[98] The sanctions[99] associated with noncompliance should be clearly enumerated

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[93] *See* GUIDE FOR FACULTY, *supra* note 43.

[94] *E.g.*, *infra* note 106.

[95] A proposed University of Maryland Honor Code "requires students to sign a pledge not to cheat." *See* Collison, *supra* note 38.

[96] The GUIDE FOR FACULTY, *supra* note 43 encourages faculty to have a "signed Honor Pledge on each test or paper before it will be graded." GUIDE FOR FACULTY *supra* note 43. The University of Virginia Honor System makes use of a formal "commitment" to their Honor Code both at the time of admission and throughout a student's course of instruction at the university. "At the first convocation the students sign on for this commitment." Conversation with Travis Lewis, *supra* note 89. Furthermore, "many tests are take-home finals . . . you swear you had no help and report how long it took you to finish it." *Id.* In fact, the importance of the Honor Code at the University of Virginia is emphasized by the fact that "[w]hen applying for admission to the university, *students must write an essay about the honor code*." Collison, *supra* note 38.

[97] DEGEORGE, *supra* note 5, at 387-88.

[98] Some argue that the only effective system is one which offers the most severe sanction available, expulsion. *See* Schmitt, *supra* note 20. It can be argued that an "expulsion only" system provides that greatest motivation for students to comply and thus, the greatest deterrence.

[99] Sanctions can range from "oral reprimands" to "expulsion." The following is the list of "sanctions" provided in The Judicial System of the University of Virginia:

> 1. ORAL ADMONITION: An oral statement to a student or student group that a Standard of Conduct as [sic] been violated.
> 2. WRITTEN WARNING: Notification that continuation or repetition of

in the educational process. The regulatory function gives practical meaning to the educational purpose. Without the threat of sanctions, the educational support system is more likely to fall upon deaf ears.[100] Failure of severe and consistent prosecution of honor code violations is likely to result in what one commentator describes as nothing but "cosmetic code-making."[101] The regulatory purpose of the honor code can be divided into two distinct areas: (1) the policing of the code, and (2) the enforcement of the code.[102] The first area deals with the best way to detect honor code violations, along with

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specific misconduct will be cause for more severe disciplinary action.

3. ACADEMIC REPRIMAND: Written censure for violation of Standards of Conduct placed in the guilty student's academic file and the Dean of Student's file. The notification may be removed after a specified period of time.

4. PROBATION: Exclusion from participation in University activities or privileges for a stated period of time.

5. RESTITUTION: Reimbursement for damage to or misappropriation of property, to be paid before the conclusion of the next full semester.

6. FINE: A monetary punishment for actions or damages beyond the evaluation of any restitution. The fine shall be no lower than 10 dollars and no higher than 100 dollars and shall be paid before the conclusion of the next full semester.

7. WORK SANCTIONS: Service performed for the benefit of the University community, to be completed by a specified date.

8. SUSPENSION HELD IN ABEYANCE: Exclusion from classes and activities for a stated period of time to be enforced automatically should another conviction of like nature occur.

9. SUSPENSION: Exclusion from classes and activities for a stated period of time.

10. EXPLUSION: Termination of student status for an indefinite period. Terms of readmission, if any, shall be stated in the order of expulsion.

UNIVERSITY OF VIRGINIA, THE JUDICIAL SYSTEM 10 (1989) [hereinafter THE JUDICIAL SYSTEM].

[100] "[A] code of ethics that is not enforced is a code of ethics *without teeth*, and it will be treated as such . . . ." Laczniak, *supra* note 2. "An ethical code has little meaning unless it can be enforced." J. CEDERBLOM & C. DOUGHERTY, ETHICS AT WORK 195 (1990). An associated issue is how severe should the punishment be for a given violation? The commentators answer this question using two theories. First, the *utilitarian approach*: "Because a penalty is a harm, you should inflict no greater penalty than is necessary." *Id.* at 196. Second, a *contractarian approach*: "[A]s much as they deserve . . . the more serious the violation, the greater the penalty should be." *Id.* at 197.

[101] J. Leubsdorf, *Three Models of Professional Reform*, 67 CORNELL L. REV. 1021, 1025 (1982).

[102] By enforcement of the code, the discussion will revolve around the procedural and substantive due process issues associated with the enforcement process of "prosecuting" cases of misconduct. *See infra* part II.

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encouraging the reporting of detected misconduct.[103] The second area concerns how to best enforce the code once a violation is detected.

### *1. Policing the Code: Is Big Brother Watching?*[104]

In order for an honor code to be a "living document"[105] and not just a "cosmetic" code, it must be energetically administered. The most difficult step in the administration of such a code is the monitoring of conduct in a fair and nonintrusive way. However, it can be argued that some degree of intrusiveness can be justified by the idea that academia is a "profession" that is voluntarily entered. The students expressly[106] or implicitly[107] agree to abide by the honor code when they accept admission to the school. But, who is primarily responsible for the monitoring and policing of the code?

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[103] The encouragement of students to report honor code violations is the reason most often given in support of "nontoleration clauses" in honor codes. In short, if one fails to report a violation, he or she may be subject to sanctions in the event the violation is reported by someone else and the nonreporting party is "placed at the scene" of the misconduct. The requirement to report other violators can be found in other ethical codes. DR 1-103 states:

> A lawyer possessing knowledge, not protected as a confidence or secret, of a violation of DR 1-102 that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness in other respects as a lawyer *shall report* such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

NEW YORK STATE BAR ASS'N, CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103A (1990).

[104] *See* GEORGE ORWELL, 1984 (6th ed., 1992).

[105] One needs to look no farther than the United States Constitution for an example of a "living document." A document that continues to be vibrant and has guided an entire nation since its adoption in 1787. Benjamin Franklin espoused the importance of not only the writing of such a document, but the equal importance of actively administering the dictates of the document. "I hope, . . . for our own sakes . . . [that we] turn our future thoughts and endeavors to the means of having it well administered." D. BOORSTIN,THE LIBRARIAN OF CONGRESS, UNITED STATES CONSTITUTION BICENTENNIAL EDITION 15 (1987). One may argue that our Constitution serves as sort of an honor code. It provides guidance to our elected and appointed officials as to how they should conduct the affairs of the country. Thus, the importance of diligent administration of any written document is what allows it to "live" and function from one generation to the next.

[106] Some schools (and companies) require their students (employees) to sign a "pledge" to honor and obey the Honor Code or Code of Ethics. This is sometimes done at the time of admission or prior to sitting for an examination. For example, the University of Miami provides for the use of an "Honor Pledge" to be signed by the student before submitting a test or paper. The Honor Pledge states: "On my honor, I have neither given nor received any aid on this examination/assignment." GUIDE FOR FACULTY, *supra* note 43. "Most firms required officers and key employees to periodically sign the code, but only about 25% required other employees to sign." Stevens, *supra* note 24, at 65 (citations omitted).

[107] When a formal written "pledge" is not utilized, the importance of the advance notice function of the code becomes even more important. *See supra* notes 89-96 and accompanying text.

Should the primary responsibility be placed upon the professors, the school administrators, or the students? The answer partially lies in the "type"[108] of code that has been adopted and whether it contains a nontoleration provision.[109] However, earlier we reasoned that it was not unreasonable for the different constituencies, students, professors and administrators, to expect the others to live by a high standard of ethical conduct.[110] Therefore, it would not be unreasonable for the different institutional groups to share in the responsibility of policing the school's honor code.

### a. School Administrators: I Will Follow Her, Wherever She May Go[111]

Most organizations are hierarchical in structure. Oftentimes the structure has numerous layers. In the traditional corporate world, the control of the corporation is divided among three groups: directors, officers, and shareholders.[112] For purposes of allotting responsibility for the enforcement of a school's honor code, one can analogize the university organization[113] with that of the traditional public corporate structure.[114] The parallelism to be employed is as follows: (1) the university trustees[115] are substituted for the board of directors; (2) the school administrators[116] are substituted for the corporate officials; and (3) the students will be viewed as the "shareholders"

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108. *See supra* note 21 and *infra* Appendix A.

109. One can argue that the existence of a nontoleration clause places the primary onus upon the students. In short, the honor code is intended to be self-policing by the student body. A student enacted honor code, as compared to an administration enacted one, may be another factor that places primary responsibility upon the students for enforcing "their" honor code. *See supra* note 82.

110. *Supra* notes 79-82 and accompanying text.

111. From the lyrics of a 1950's popular song.

112. The shareholders are the owners of the corporation. The foremost responsibility of the shareholders is to elect a board of directors. The board of directors "set the objectives or goals of the corporation, and they appoint the officers." The officers manage the day to day operations of the corporation and work to implement the goals and objectives set by the board of directors. However, the board of directors and the officers of the corporation are sometimes grouped together as the "management" of the corporation. *See* CORLEY et al. *supra* note 11, at 300.

113. Hereinafter, the term "university" will apply to all institutions of higher education (those beyond the secondary high school level).

114. In fact, many universities and colleges are corporations. They may take the general corporate form or the related "not-for-profit" corporate form. Common examples of "not-for-profits" are charitable and religious organizations.

115. University trustees are generally prominent members of the community who are normally serve without compensation. They are elected by the alumni of the university or appointed by government officials (state funded institutions).

116. School Administrators include the President, Vice-Presidents, Deans, Provosts, and Directors of Admissions, Placement, and Alumni Affairs.

of the University.[117] The University Professors form a hybrid group somewhere between the status of administration and employment.[118] For purpose of our analysis, whether they are viewed as "lower level" administrators or as strictly employees is not of great analytical importance. It is sufficient to recognize them as frontline players in the indoctrination and enforcement of the university's honor code. For purpose of the implementation of honor codes, the role of the university trustees is more symbolic. However, the role of the trustees should not be one of detachment and total delegation of the setting of the educational and moral tone of the university to the full-time administrators. Fundamentally, they are primarily responsible to the students of the university. The initial act of this responsibility is the selection of the President of the University. The trustees should question prospective candidates on their knowledge and commitment to the school's honor code. Secondly, the would-be president's strategies and ideas for the effective implementation of the code should be fully explored. Thirdly, the trustees should clearly state that the President should make the effective implementation of the code one of his or her top priorities.[119]

Finally, the Board of Trustees should remain active in overseeing the implementation of the honor code. This responsibility could be formalized by requiring the President to periodically review and report on the university's Honor System.[120] The moral tone of the university, as in all hierarchical institutions, begins at the top with the Board of Trustees and the President.[121] Indeed, it is at this level that the moral fabric of an institution is first tested.

The top "managerial" officers or administrators of the university, the President, Vice-Presidents, Deans, and Provosts, then must monitor the day-to-day implementation of the code. Only if the top university administrators are committed to the honor system will it be effectively implemented.[122] Once again, the moral tone of the university is initiated primarily by those at the "top." The corporate world provides support for this contention. "[One] study found that managers ranked the behavior of superiors as the strongest single factor in deterring unethical behavior."[123] However, simply possessing high personal ethical standards does not fulfill an administrators' responsibility. The Administrators must communicate[124] the importance of abiding by and implementing not only the letter, but also, the "spirit" of the honor code.[125] It is important for administrators to foster a "university culture" that recognizes the importance of proper ethical conduct at all levels of the university.[126] The communication by administrators of the importance of the honor code to the life of the university must be clear. "Visible signs must exist that ethics matters"[127] to the university. Thus, university administrators should spend time at meetings with the different university constituencies discussing the Code and

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[117] Students through the payment of tuition can be viewed as having an "ownership interest" in the university. This ownership interest is reinforced by the election of student representatives to university committees and boards. Upon graduation, the student receives his or her "stock certificate," a diploma. As alumni, they may have rights to elect the school's trustees.

[118] A distinction can be made between tenured and non-tenured teachers or instructors. Non-tenured professors, lecturers, and teaching assistants can more easily be viewed as employees. Tenured faculty, through their faculty government and administrative appointments, are more akin to being an official or administrator of the university.

[119] For example, it should be made clear that the trustees' believe that an effective and nationally recognized Honor System enhances the health and prestige of the entire university.

[120] This technique of periodic reviews was described by Professor DeGeorge in relationship to large, public corporations. "Responsibility for policies and decisions by management at all levels should be tracked for *at least five year periods* . . . ." DEGEORGE, *supra* note 5, at 165.

[121] This idea of the moral tone of any organization beginning at the top has been discussed in depth in the area of corporations. *Id.* at 157-73.

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[122] In the area of competition, some argue that the lowest level of ethical conduct will prevail. The argument goes that competitors will feel the pressure to compete and lower their standards to that of a competitor. One commentator described this as "[t]he Fallacy of [the] 'Follow-the-Leader' Syndrome." R. HARTLEY, BUSINESS ETHICS: VIOLATIONS OF THE PUBLIC TRUST 312 (1993).

[123] Laczniak, *supra* note 88.

[124] *See supra* note 92.

[125] The distinction between the letter of the code and the "spirit" of the code is stated in a United States Military Academy Pamphlet titled "THE HONOR CODE AND HONOR SYSTEM." The Honor Code is described as establishing the minimum "rules" of ethical conduct. While the spirit of the code is described as something much greater:

> That ideal is the "Spirit of the Code," an affirmation of the way of life that marks true leaders of character. The Spirit of the Code *goes beyond the mere external adherence to rules*. Rather, it is an expression of integrity and virtue springing from deep within . . . .
>
> * The Spirit of the Code embraces truthfulness in all its aspects . . . .
>
> * The Spirit of the Code call for complete fairness in human relations . . . .
>
> * The Spirit of the Code requires respect for the person and property of others . . . . [G]rowth of each [student] . . . is marked by strict adherence to the minimum standards of the Code, combined with a driving desire to progress beyond the external standards to an internalization of the Spirit of the Code.

USCC Pamphlet No. 632-1, THE HONOR CODE AND HONOR SYSTEM 5-6 (1990) (emphasis added) [hereinafter USCC].

[126] Often it is the unwritten rules of an organization that have the greatest impact upon conduct. For example, "a profit at any cost" attitude within a corporation is likely to foster unethical decision-making. These unwritten rules of an organization are often referred to as the "culture" of the organization. *See* Murphy, *supra* note 24, at 908.

[127] *Id.* at 915.

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the "Spirit of the Code."[128] Allowing school administrators to set the proper "ethical tone" for the university is paramount for an Honor System to prosper. Furthermore, the establishment of the appropriate "culture" is vital if the Honor Code is to rise "beyond the mere external adherence to rules."[129]

### b. The Faculty: "Running a Tight Ship"

The role that the university professor plays in the implementation and enforcement of an honor code is mutli-faceted. This multi-faceted role covers both the educational and regulatory functions of the honor code. The professor serves his or her role as an "educator of the honor code" in a number of ways: (1) as an initial indoctrinator of the existence, purpose, and meaning of the code and the repercussions for its violation;[130] (2) as a "role model" for high ethical conduct and integrity;[131] and (3) as an "instructor of ethics" throughout the duration of the course.[132] The importance of the professor in his or her "role of educator" in the area of ethics was recently and clearly stated. "[A] great need exists for the serious and continuing attention to the content and transmission of professional values and ethical practices from faculty members to students . . . ."[133]

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[128] *See* USCC, *supra* note 125.

[129] *Id.* at 5.

[130] An example of a professor's role in the indoctrination process would be the use of a portion of the first class to introduce his or her students to the honor code.

[131] Article IV of the Code of Ethics of the American Association of University Professors states that as "members of an academic institution, professors seek above all to be effective teachers . . . ." To be effective teachers would seem to require the earning of the respect of the students as a caring, knowledgeable person who imparts the values of honesty, integrity, and fairness. If students view their professor as not teaching and awarding grades based strictly upon merit, then it will be nearly impossible for the university to expect its students to live by the "spirit" of the honor code. AMERICAN ASSOC. OF UNIV. PROFESSORS, STATEMENT OF PROFESSIONAL ETHICS, Art. IV. (1987). Some have argued that this function of "role model" is even more paramount at the graduate level. Three commentators posed this question: "To what extent are faculty members responsible for educating their students about the ethical standards and practices that should govern research?" Their survey of 2000 faculty members found that "*99 per cent* of [the] faculty respondents . . . believe that academics should exercise collective responsibility for the professional conduct of their students . . . ." J. Swazey, et al., *The Ethical Training of Graduate Students Requires Serious and Continuing Attention*, CHRON. HIGHER ED., Mar. 9, 1994, at B1-2.

[132] As an "instructor of ethics" the authors are not suggesting that "formal ethics" instruction be a part of every course regardless of subject matter. We are suggesting that every professor has a duty for imparting the importance of academic honesty to their students. This can be performed by: (1) emphasizing "fairness" in the process of teaching and assigning of grades and (2) by taking seriously the notion of being an "ethical role model." *See supra* text accompanying note 131. This notion of *all professors* as instructors of ethics is clearly implied in the following "obligation" found in a faculty manual: "To stimulate and encourage the identification of the values and judgments implicit in personal, institutional and social decisions." *See* THE FACULTY MANUAL, *supra* note 73, at 12.

The professor also serves as a key "regulator" of code compliance and enforcement. He or she is the administration's frontline representative in following through in the implementation of the code and the "spirit" of the code. As a regulator of the honor code, the professor serves in two areas: (1) enforcement, and (2) prevention. First, professors are one of two groups who can initiate the enforcement and sanctions process, the other being the students themselves.[134] Professors must be alert to acts of cheating and plagiarism, and be willing to refer the honor code violation to the Honor Council.[135] The ultimate success and effectiveness of the honor system rests upon the deterrence provided by the detection and the prosecution of violators.

The importance of enforcement was evident from a survey that found that "78 per cent of the students [at a major university] acknowledged that they had cheated."[136] Some commentators have attributed part of the blame to professors' "reluctan[ce] to turn in students who cheat."[137] One reason often cited is the professors' willingness to "handle" the matter internally through the grading process.[138] Another reason given is that professors are not willing to get involved in a possibly lengthy process with themselves in the role of "prosecutor."[139] However, for the Honor System to work, the unpleasant task of reporting students for code violations cannot be avoided. If a professor observes a violation he or she should report the student's misconduct to the Honor Council and not treat it "internally" by issuing a failing grade.[140] It would seem that the ability of the Honor Code to develop a proper ethical culture within the student body is best served by a strict enforcement approach. Such a "public indictment" that a formal complaint serves, will hopefully act to deter the violator from future violations and to provide a deterrence to other potential violators.[141]

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[133] Swazey, *supra* note 131 at B2. For an interesting aside on the effect of the depressed state of the academic job market on the "moral base" of graduate education, see C. Nelson & M. Berube, *Graduate Education is Losing Its Moral Base*, CHRON. HIGHER ED., Mar. 23, 1994, at B1.

[134] *See supra* part I.B.1.a.

[135] Honor Council will be the term used to apply to the body (generally, a student body) authorized to hear and punish honor code violations. Other names are also used for this body, for example, University Judiciary Committee (University of Virginia) and Honor Committee (United States Military Academy.)

[136] Collison, *supra* note 38. This survey was conducted by the University of Delaware. In response, it "*revamped its academic code.*" *Id.*

[137] *Id.*

[138] For example, one Faculty Guide acknowledges this option of self-enforcement. "Rather than initiate an Honor Council case, a professor may choose to give a failing grade for a violation of the Code which is personally observed or determined by the professor." GUIDE FOR FACULTY, *supra* note 43, at 4.

[139] Generally speaking, the Honor Hearing is not considered an adversarial or judicial process. It is more akin to an administrative or quasi-judicial process. For example, the right to an attorney's presence at the hearing is not required. *See infra* notes 274-82 and accompanying text.

"Let us consider prevention first"[142] is a familiar adage often used when discussing today's social ills. Prevention is also a key ingredient in any fair-minded honor system. Furthermore, as "trainers of young minds"[143] the notion of instilling students with a high ethical code is much more appealing to professors than the task of prosecuting honor code violators. Thus, professors should seriously consider their role in the area of prevention.[144] Prevention can take two forms: (1) the pedagogical act of instilling the "spirit of the code"[145] and (2) the removal of temptation.

A professor's pedagogical role may be fulfilled minimally by a review of the honor code during a portion of the introductory class. However, "instilling the spirit of the code" demands a constant attention to the importance of ethical conduct. All fields of study possess ethical gray areas. When an opportunity presents itself, a professor should not avoid the ethical dimension of a particular problem or issue. Instead, he or she should actively pursue the ethical ramifications as a way of educating their students in the practical or real world importance of honor code or ethical-type issues. For example, a discussion of possible alternatives to a problem in order to find a more ethically justifiable solution should be encouraged.[146] Also, students should be encouraged to pursue creative, original ideas in their research in order to avoid the pitfalls of plagiarism. It is the hope that a constant "dose" of the importance of living by the spirit of the honor code will sensitize[147] students to ethical dilemmas,[148] assist them to recognize that

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[140] However, professors' concerns with being involved in a lengthy, adversarial process should be addressed. Two areas of focus could be pursued. First, the use of an Honor Council official to conduct the investigation and to help "insulate" the reporting professor from the negative aspects of the honor process. Second, to streamline the process to make it as less intrusive as possible on a professor's time. Of course, this must be balanced against the due process concerns of the accused violator. These concerns will be addressed in our section on "due process." These two areas of concern were noted by one commentator. "Judicial-affairs officers on campuses say colleges must also make it easier for faculty members to turn in students who cheat." Collison, *supra* note 38, at A1.

[141] It can be argued that if cheating is unpunished in the academic arena, then those beneficiaries of lax enforcement are likely to continue their cheating conduct after graduation. "If students show a willingness to engage in academic dishonesty now, they will be more likely to engage in white-collar crime later." Swazey, *supra* note 131, at B2.

[142] HOSNER, supra note 61, at 153.

[143] Professor DeGeorge emphasizes the importance of "introduc[ing] students to as much of the technical aspect[s] of ethics as is necessary." DEGEORGE, *supra* note 5. *See also supra* part I.A.1.a.

[144] As discussed earlier, an important function of the honor code is education and prevention. Other examples of prevention are: the use of the Honor Pledge, the forwarding of materials on the honor code to newly admitted students, the essay writing requirement utilized at the University of Virginia (*see* THE JUDICIAL SYSTEM, *supra* note 99), the exposure to the honor system at orientation, and the use of formal ethics instruction in the curricula.

[145] *See* USCC, *supra* note 125.

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[146] The search for ethically superior alternatives is associated with the philosophy of "utilitarianism." In short, the best solution to a problem is the one "which produces the greatest amount of good for the greatest amount of people." *See generally* J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789); UTILITARIANISM, (S. Gorovitz ed., 1971); UTILITARIANISM (B. Williams & J. Smart eds., 1973); G. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION (1986). An alternative statement of this ethical approach is whether "the results promote the common good?" The focus upon the "results" of an act is why utilitarianism is considered a consequentialist or teleological approach to ethics. For example, the use of utilitarianism has been used by courts to restrict certain private rights in granting easements or rights of way. "Courts regularly uphold traditional and recently modified easement customs on the ground that they provided *the greatest good for the greatest number*." A. Loux, *The Persistence of the Ancient Regime: Custom, Utility, and the Common Law in the Nineteenth Century*, 79 CORNELL L. REV. 183, 201 (1993) (emphasis added).

[147] This notion of "sensitizing" students to ethical issues is considered the core of most courses in ethics. In fact, one can argue that the most that formal ethics instruction can do is to sensitize students to ethical issues that they may not have been cognizant of, previously. One author states, "business ethics educators can facilitate the development of *awareness* of what is and is not ethical . . . ." J. WEISS, BUSINESS ETHICS: A MANAGERIAL, STAKEHOLDER APPROACH 21 (1994). Some commentators believe that ethics instruction beyond a relatively early age is unlikely to have any impact on a student's conduct. The argument can be framed as follows: "By the time that people enter [college] . . . their personal values are so firmly set it is futile to teach them about . . . ethics." T. Dunfee, *Professional Norms of Business Ethics*, 25 AM. BUS. L. J. 389, 398 (1987); "[S]ome business educators believe that dealing with business ethics in the classroom will have little or no lasting effect upon the morality of their students." Laczniak & Noar, *supra* note 2, at 6. However, some "[e]vidence exists, at least with teenagers, that codes may alter behavior. A . . . recent survey reported that 29% of 13-18 years olds said they would cheat . . . however, only 13% said they would do so if they had signed a school pledge not to cheat." Stevens, *supra* note 24, at 68 (citing L. Ansley & K. McCleary, *Ethics At Work: Help Wanted*, USA WEEKEND, Aug. 21, 1992, at 5). Whether the utilization of an honor code system or the formal teaching of ethics is effective in shaping a student's conduct is yet to be clearly determined. However, a strong case can be made that such ethical tools help sensitize students to ethical issues. "One study . . . that surveyed 125 graduate and undergraduate students in a business ethics course at the beginning of a semester showed that students did not reorder their *priorities* at the end of the semester . . . but did *change the degree of importance* they placed on the majority of the issues surveyed." WEISS, *supra* note 147, at 20. Stating it more simply and basing it on personal experience, Professor Dunfee acknowledges that "[c]ommonly, students will express that they are thinking about an issue for the first time, or that they have not developed an attitude about the question being discussed." Dunfee, *supra* note 147, at 399. It is the hope of all professors that by sensitizing their students to ethical issues that student conduct will be positively impacted.

[148] The notion of "ethical dilemmas" is the focus of most formal courses in ethics. We do not need formal ethics instructions to realize that lying, cheating, stealing, or killing is morally wrong. However, many ethical or honor code issues are far from having ethically clearcut answers. This

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such temptations will continue through life, and to help them develop "mind-sets" to resolve such issues in a positive way.

The "removal of temptation"[149] component of prevention is best satisfied by the use of proper, commonsensible procedures and practices by professors. The 1992 Naval Academy cheating scandal emphasized the importance of running a "tight ship" when administering exams. The follow-up investigation made a number of recommendations directed at the Academy's instructors. "[A]cademy instructors [should be prohibited] from giving the same exam more than once and [should] require the writing of a new exam if officials suspect that an exam has been lost, misplaced or stolen."[150] Other procedural safeguards include: the proper proctoring of exams,[151] establishment of proper controls over the preparation and storage of exams,[152] the use of essay examinations where possible, and the use of clear instructions regarding the "kinds of aid and collaboration, if any, [that] [are] allowed on assignments."[153] The authors fear that such common sense precautions are often avoided as a matter of convenience. "Convenience" is not a sufficient reason for faculty members to avoid the reporting of honor code violators or for the failure to implement the proper preventive measures to ensure that their exams are not compromised.

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is why it is important for students to be instilled with the "spirit of the code" so that they will attempt to comply with the code "out of a sense of doing right, rather than out of a fear of sanctions." Dunfee, *supra* note 147, at 390.

[149] This can be viewed as the "negative" counterpart to the pedagogical side of prevention. Foremost, professors would like to treat ethical concerns in a "positive way." This positive way can best be described as "education and training." However, it is the professor's duty to administer his or her course to make it difficult for those with the "propensity" to cheat and to avoid unnecessary temptations for those with the "propensity" not to cheat.

[150] Schmitt, *supra* note 20, at A1.

[151] The University of Miami "Faculty Guide" gives the following suggestions for proctoring an exam:
a) Post a different seating chart for each examination . . . .
b) Use multiple versions of the same exam.
c) Develop procedures to confirm the identify of persons taking exams.
d) Control the ingress and the egress of students during the administration of an examination.
[The authors would suggest that the Professor personally proctor his or her exams.]
GUIDE FOR FACULTY, *supra* note 43, at 4.

[152] Personally handling the exams at all times is the best caution against theft of the exam. For example, preparation and storage of the exam at home and personally taking the exam to the copy center would help insure the security of the exam.

[153] GUIDE FOR FACULTY *supra* note 43, at 4.

### c. The Students: A "Scout" is Trustworthy[154]

One can argue that the effectiveness of an honor code will rise or fall depending upon the "integrity"[155] of the student body. For example, the highly regarded University of Virginia Honor System receives over half of their substantial amount of honor case referrals from the student body.[156] The reasons for the importance of student reporting of honor code violations are two-fold: (1) they are in the best position to detect and report noncompliance; and (2) they are the ones most directly harmed by such violations. But, more importantly, do they have a duty to report violations?[157] If so, when does this duty to report "mature"? First, do students have a duty to report violations of the honor code? The rationales given in support of this duty will be divided into two general categories: (1) contractarian[158] and (2) ethics-based justifications. The first rationale is based upon a simple theory of contract. By entering the university, a student has entered into a contract to uphold the honor code.[159] But, does this "contract" require a student to "try to influence the behavior of [fellow students] as well?"[160] Given the reasons for the honor code and the students status as "professionals"[161] it would not seem unreasonable to answer this question in the affirmative. A general reason given for the use of honor codes is "to foster a climate of fair competition."[162] This climate of fair competition is at the heart of the students academic endeavor. It is in their own self-interest to insure that their fellow students do not obtain an unfair advantage in the procurement of grades.[163]

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[154] The Boy Scouts of America, The Scout Law. "A Scout is trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean and reverent." *Id.*

[155] The authors do not intend to infer that institutions with low student referred honor code cases have a student body of lesser integrity than one with a higher amount of referrals. The low amount of referrals may be more a reflection on the lack of importance placed upon the honor system as a whole or a lack of the necessary enforcement "culture." *See supra* notes 126-29 and accompanying text.

[156] "We have 80 to 100 complaints a year, 55 initiated by students." Conversation with Travis Lewis, *supra* note 89.

[157] The authors will initially analyze the notion of duty under an honor code which does not contain a "nontoleration" clause. Such a clause expressly requires students to report honor code violations.

[158] The term "contractarian" comes from a textbook dealing with ethics. *See* J. Cederblom & C. Dougherty, Ethics at Work (1990). However, the authors will utilize the term in a more nonethical way. We will focus our analysis on a simple "theory of contract." However, there are clearly ethical overtones. For example, the notion of a religious based "social compact" or generally that contract obligations come within the realm of "duty-based" ethics. Duty-based ethics are generally grouped into an ethical school known as deontology. Examples, of ethics-based theories include: the Bible's Ten Commandments and its "Golden Rule," Immanuel Kant's "Categorical Imperative," and John Rawls' "Theory of Justice." *See generally* I. Kant, Foundations of the Metaphysics of Morals (1985); H. Patton, The Categorical Imperative (1948); John Rawls, A Theory of Justice (1971).

[159] One may argue that this contract between the student and the university is one of "adhesion." Because the university has superior bargaining power, (the greater, the more "prestigious" the school?), the student has little choice as to the so-called contract terms. However, it can be argued that the fuller the disclosure, the less adhesive, or at least, the less unfair the contract. Therefore, the importance of advance notification of students of the honor code and the meaning of the honor code becomes paramount under this contractual theory.

As a member of the "student profession," students are obligated to self-police the conduct of all those within their profession. As professionals, students are given a great deal of autonomy.[164] This autonomy comes with a price.[165] The students must act honorably and assume special responsibilities in maintaining the high ethical standards of the profession. As in other professions, this requires the reporting of those who violate the profession's ethical code.[166] Thus, those who voluntarily enter into a profession are "contractually" obligated to maintain and enforce the profession's code of ethics. This responsibility to enforce the professional ethics code can be implied in the very meaning of "profession"[167] or may be expressly stated in the profession's code of ethics.[168]

The expressed "contractual" obligation to report wrongdoing under an academic honor code is generally referred to as the "nontoleration" clause.[169] This provision in an honor code makes it clear that it is the duty of every student to self-police the honor code.[170] In short, anyone who fails to report an observed violation of the code is also guilty of a code violation.[171] The problem with nontoleration is the competing sense of "loyalty"[172] to a fellow student[173] that will be breached by reporting the violation. This problem is compounded by the social stigma attached to those who report others, commonly referred to as a "snitch."[174] This "problem" is acknowledged by the United States Military Academy through, perhaps the most difficult standard, the Honor Code's nontoleration clause. The nontoleration clause serves as a cadet's daily reminder that he or she is charged with an awesome duty, far superior to his or her personal feelings or friendships.[175]

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[160] CEDARBLOM & DOUGHERTY, *supra* note 158, at 187.

[161] *See supra* part I.A.1.b.

[162] UNIV. OF MIAMI, *supra* note 17, at 1.

[163] The academic contract presumes that grades will be based upon merit and that they will not be arbitrarily assigned or be affected by "inside information."

[164] For example, students are allowed to elect a student government in order to represent the interests of the student body. Also, the Honor System is normally a student run operation. "Two students are selected to investigate. The trial is student run." Conversation with Travis Lewis, *supra* note 89. The University of Miami Honor Council "consists of 22 outstanding students who have been well trained to hear cases of cheating . . . ." Letter from Dean W. Sandler, Jr.

[165] This notion of professional autonomy and its resultant responsibilities for such autonomy has been summarized as follows: "Typically, professions have been self-governing, and society has allowed a large amount of autonomy." DEGEORGE, *supra* note 5, at 382.

[166] E.g., the lawyer's code requires "disclosure of [misconduct] to authorities." NEW YORK STATE BAR ASS'N, *supra* note 103.

[167] *See supra* notes 77-88, 165-168 and accompanying text.

[168] *Supra* note 166.

[169] For a definition of "nontoleration," see *supra* note 28.

[170] "The nontoleration clause represents the codification of *'policing the ranks'* within the profession. USCC, *supra* note 125, at 24.

Nonetheless, it is made clear that any failure to report will not be tolerated. "[I]t is the responsibility of its members to maintain the standards that have been set."[176] In fact, the Honor Code does not even sanction giving someone the "benefit of the doubt"[177] when one is unsure of whether a violation has occurred: "Giving a cadet 'the benefit of the doubt' is *not* in keeping with proper reporting procedures and *may constitute toleration.*"[178] Thus, under a contractarian approach, a student has the obligation to report honor code violations. This is due to an expressed or implied agreement to do so.[179]

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[171] The importance of a nontoleration clause may be shown by an analogy in criminal law. In essence, the clause converts an "innocent bystander or witness" to that of a "criminal accomplice."

[172] This notion that reporting misconduct is a "breach of loyalty" was acknowledged by Professor DeGeorge in the area of corporate whistle blowing. "[Whistle blowing] does involve disloyalty . . . to one's fellow workers." This notion of disloyalty to one's fellow workers may have practical consequences for the whistle blowers—namely, his or her ability to continue to function in the workforce. But, from an ethical point of view, it is "[i]n fact . . . a form of corporate loyalty . . . to stop dishonesty or some immoral practice or act, to protect the interest and reputation of the company." DEGEORGE, *supra* note 5, at 201.

[173] A survey at the United States Military Academy found that "73 percent of the cadets would not report a good friend for a possible honor violation." Beasley, *supra* note 16, at 194.

[174] A "snitch" or "snitcher" is defined as "an informer." Another contemporary label is "fink" which also has come to mean "one who informs against another." AMERICAN HERITAGE COLLEGE DICTIONARY 1289 (3rd. ed. 1993).

[175] USCC, *supra* note 125, at 24.

[176] *Id.*

[177] However, the Honor System does provide for a number of "tactics" that may be used by an observing student. When in doubt as to whether an alleged violation has occurred, a student may approach the other cadet and "[g]ive the other cadet an opportunity to explain the situation before alleging it to be an 'honor violation.'" *Id.* at 25. If the explanation fails to remove the suspicion of a violation, then a cadet should "[e]ncourage the suspected cadet to report him or herself." *Id.*

[178] *Id.* at 26.

[179] "If the students are on the honor system, they have agreed to report cheating and are morally obliged to do so." DEGEORGE, *supra* note 63, at 201.

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Contractarian notions aside, do students have an ethical duty to report honor code violators? Several widely accepted approaches to ethical reasoning are of assistance: (1) utilitarianism; and (2) deontology or duty-based ethics. Under a utilitarian approach,[180] one needs to "calculate" the benefits and harms associated with not reporting an honor code violation. If the result of this calculation is a net benefit, then not reporting the violation would be morally correct. Alternatively stated, one should view the consequences of an action or nonaction to determine if the "common good" would ultimately be benefited.[181] The benefits of not reporting a code violation include the advantage or benefit obtained by the violator and the avoidance by the observer of a certain amount of inconvenience, along with the possible stigma of being a "snitch."

The costs to be balanced against these "benefits" include harm caused to the violator, the observer, the other students, and to the university. The direct effects would be borne by the observer and his or her fellow students. Allowing a fellow student to obtain an unfair advantage is likely to compromise the grading process. The grade of the violator is likely to be inflated above what it may have been ordinarily. Consequently, the innocent observer and his fellow students may obtain a lower score in the "competition" for grades. Furthermore, by not performing according to the rules of fair competition, the violator may be causing harm to himself or herself. In short, the violator is cheating himself or herself of an education. By not earning a diploma on the merits, the student will have a lower level of competency and will be less prepared for the work force. Eventually, if such conduct goes unchecked, the integrity of the school will be blemished. The utilitarian analysis can be further expanded. For example, if the integrity of the institution is harmed, then the graduates of that institution will be harmed because their diplomas may be viewed as being less meaningful.[182] Finally, because universities have been established to benefit society,[183] by producing incompetent and unethical graduates, society as a whole will be harmed. Thus, under a utilitarian analysis, the harm caused by the nonreporting of honor code violations outweighs any perceived benefits.

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[180] The founding of utilitarianism is most often attributed to Jeremy Bentham (1748-1832) and John Stuart Mill (1806-1873).

[181] The utililitarian principle is often formulated as follows: "Act in a way that results in the greatest good for the greatest number." Laczniak, *supra* note 88.

[182] For example, this concern was apparent in the recent Naval Academy cheating scandal. "Overall, the Navy has suffered one black eye after another . . . Admiral Bennett's [Naval Inspector General] report . . . would also challenge the commitment to ethical teachings at an institution whose honor code prohibits lying, cheating or stealing by midshipmen . . . ." Schmitt, *supra* note 20, at 1.

[183] THE FACULTY MANUAL, supra note 73.

There are several ethical theories that are deontological in scope.[184] Two of the more formalistic[185] and popular ones are the "categorical imperative" espoused by Immanuel Kant[186] and John Rawls' "Theory of Justice."[187] Immanuel Kant stated the formalism of moral law by way of his "categorical imperative." Under the "categorical imperative" the morality of an act is both universal and unconditional. Thus, one act of cheating cannot be justified no matter what the circumstances or reasons given. Moral law is unconditional. On the other hand, one may argue that the definition of cheating may vary from person to person. Precisely constructed "definitions" and "principles" always require considerable analytical skill. Therefore, the morality of the action may come into question. Kant dismisses this reasoning under his assumption that moral law can only be deduced by "rational beings." And, by definition for a being to be rational, he or she would formulate the one and only deduction of the moral law.[188]

Therefore, under Kant's notion of rational beings and the unconditional nature of moral law, cheating and other violations of the honor code are always morally wrong. First, one can argue that cheating is a form of lying or stealing.[189] Clearly, one is on safe ground in arguing that one has a moral duty not to lie or steal.[190] Second, one may argue that one has a duty to uphold one's promises. In this case, a student has entered into a "contract" to uphold the honor code. Therefore, by violating the honor code, one is breaching a contractual duty. American jurisprudence has strongly protected the sanctity of contractual duties.[191] Those guilty of breaching such a duty should be punished accordingly.

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[184] *See* CEDERBLOM & DOUGHERTY, *supra* note 158.

[185] A less formalistic approach to ethics is discussed by Professor DeGeorge under the concept of "self-regulation." For example, when faced by an ethical dilemma, simply ask yourself, "Would I be proud to tell of my action to my family, friends, or to the public?" DEGEORGE, *supra* note 5, at 389.

[186] *See* CEDERBLOM & DOUGHERTY, *supra* note 158.

[187] *See* RAWLS, *supra* note 158.

[188] *See generally* I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS(1985); H. PATTON, THE CATEGORICAL IMPERATIVE (1948), (H. Patton, trans. 1964); "Because *reason is the same for all rational beings*, we each give ourselves the same moral law." DEGEORGE *supra* note 5, at 70-71.

[189] By cheating one can argue that one is stealing. For example, plagiarism is the "stealing" of another ideas or work. Also, cheating can be defined as a form of lying. One is lying by misrepresenting that one performed an assignment without "any aid." University of Miami Honor Pledge. The historical derivation of cheating encompassed a broad area in the realm of "fraudulent" activities: *Escheators*. In old English law, officers appointed to look after the king's escheats [reversionary rights to property], a duty which gave them great opportunities of, fraud and oppression, and in consequence many complaints were made of their misconduct. Hence, it seems that a *cheater* came to signify a fraudulent person, and *thence the verb to cheat was derived.* BLACK'S LAW DICTIONARY 215 (5th ed. 1979).

[190] The duty not to lie or steal or cheat can be defended under less formalistic approaches to morality. For example, the duty can be defended under the Judeo-Christian tradition of morality which includes the Ten Commandments and the"Golden Rule" ("do unto others as you would have

Another formulation of Kant's "categorical imperative" supports the moral unanimity against violating honor codes. This formulation holds that for an action to survive moral scrutiny it must be put through a process of "universalization."[192] The notion of universalism has been formulated in different ways. For our purposes, the morality of an action can only be defended if the person choosing to follow a certain action [e.g. to cheat] "would be willing to have every person, in that same situation, act exactly [the same] way."[193] Thus, a cheater should be willing to have everyone in his class cheat as well. However, if this was the case, then he or she would have no unfair advantage and there would no longer be any "benefit" to be gained from cheating. Also, if everyone lied or cheated the entire basis for our educational system and of our society would become unraveled. The ability to "do business" is premised on a certain degree of trust and confidence that the other party will perform as promised. Kant's universalism leads to the conclusion that the "right" of one to cheat cannot be universalized and therefore is *per se* immoral.

A more "modern" Kantian approach[194] was developed by Professor Rawls in his often cited "Theory of Justice."[195] Under Rawls' "veil of ignorance," one would view a situation of academic misconduct from a position of blindness as to one's position among the different actors involved (e.g., the violator, the innocent bystander, other class members, the professor, the President, etc.). Under this "veil," the only principle of justice that can be postulated that would be fair to all rational parties[196] would be that it is unjust for anyone to violate the honor code. In fact, one

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others do unto you").

[191] *See generally* K. HALL ET AL., AMERICAN LEGAL HISTORY (1991); P. JAMES, ENGLISH LAW (9th ed. 1976); O. HOLMES, THE COMMON LAW (1881).

[192] Professor DeGeorge puts this idea of "universalization" in simple terms: "If an action is moral for me it must be moral for everyone." DEGEORGE, *supra* note 5, at 68.

[193] WEISS, *supra* note 147, at 68.

[194] "My aim is to present a conception of justice which generalizes and carries to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau and Kant." L. Kohlberg, *The Claim to Moral Adequacy of a Highest Stage of Moral Judgement*, 70 J. PHIL. 630, 635 (1973) (quoting Professor Rawls).

[195] RAWLS, *supra* note 158.

[196] Professors Rawls' harkens back to Kant's notion of the "rational being" in the determination of moral law and the morality of certain conduct.

need not go behind the "veil of ignorance" to determine the immorality of honor code violations. Rawls premises his "veil" upon two underlying principles of fairness or justice. In short, every human being has a right to be treated equally and everyone should have the right to "equal opportunity" in the pursuit of their goals.[197] The act of academic misconduct, such as cheating on an exam, completely violates these underlying principles of fairness. The innocent students are being harmed because the grading process will not be based totally upon the merits. Furthermore, the entire concept of "equal opportunity" is undermined by such acts of misconduct. One honor code expresses the importance of these principles of equality by stating that its purpose is "to foster a climate of fair competition."[198] Thus, under both the utilitarian and deontological schools of morality, students have an ethical duty to obey the honor code, including the duty to report honor code violations.

### 2. *When Does the Duty to Report Mature?: The Corporate Whistle Blowing Analogy*

In observing a "perceived" violation of the honor code, a number of courses of action can be pursued. For purposes of this discussion, we will assume that from the observer's "state of mind," he or she is unclear whether there was an actual violation.[199] Is there a morally required obligation to report a "perceived" honor code violation? Furthermore, what are possible alternative courses of action? These two questions revolve around both the "when" and "who" of reporting honor code violations. Initially, the simple, straightforward approach may be most effective. If one perceives a violation in process[200] or there are indications that one is about to occur,[201] an "intervention"[202] by the observing student may be effective as a "preventive" measure. This form of face-to-face intervention may be personally difficult, but it is likely to be highly effective in deterring the misconduct.[203]

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[197] Rawls phrases it somewhat differently as "an equal right to the most extensive basic liberties." RAWLS, *supra* note 158.

[198] UNIV. OF MIAMI, *supra* note 17, at 1.

[199] This was discussed earlier in the area of the United States Military Honor Code and its "Spirit of the Code." This very strict honor code dictates that one *must* report an alleged violation even when in doubt. *See* USCC, *supra* note 125.

[200] For example, fellow students "eyeing" other exams or students collaborating on a take-home assignment.

[201] For example, overhearing a conversation prior to the exam or seeing evidence of an intention to use "crib" or "cheat" sheets.

[202] Article V of the University of Miami Honor Code specifically states that "[s]tudents are expected to warn fellow students who do not appear to be observing the proper ethical standards . . . ." UNIV. OF MIAMI, *supra* note 17, at 2.

Also, a post-observance confrontation[204] may be appropriate when one has some doubt as to whether there was a violation. The student may ask the alleged violator for an explanation of what he or she had observed. If the explanation fails to remove the observer's suspicions, then the observer has a number of courses of action. The observer can: (1) elect not to pursue the matter; (2) file a formal allegation with the Honor Council; or (3) seek the assistance of the course professor.[205] It would seem that the latter alternative would be the most attractive course of action. This is because at the point of formally reporting a violation, the matter becomes evidentiary in nature. The professor may be in the best position to help determine if there is "sufficient evidence to warrant a charge."[206] For example, the professor may elect to sequester the exam or exams pending an investigation. In the event that the professor is unresponsive, the student may then elect to approach the honor council.

An analysis of corporate whistle blowing[207] may be helpful in determining when a student is required to report an alleged code violation. Professor DeGeorge lists five conditions for "reporting" to be morally required.[208] First, the unethical conduct will do "serious harm . . . to the innocent bystander, or [to] the institution."[209] Professor DeGeorge uses a utilitarian analysis to justify this requirement.[210] As discussed earlier, violations of the academic honor code seriously harms the innocent students and undermines the integrity of the university. Our "expanded utilitarian analysis"[211] showed that reporting violations results in a "net benefit" and is thus morally justified. This would seem to satisfy DeGeorge's threshold of harm.

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[203] For professors, the University of Miami "Faculty Guide" states that when in doubt, a "Faculty member may wish to directly confront the student with their suspicion." GUIDE FOR FACULTY, *supra* note 43.

[204] The USMA Honor Code refers to such a confrontation as an "*Approach for Clarification*" and defines it as "[a]pproaching a cadet, whom you have reason to suspect . . . [is] an inescapable responsibility never to be avoided." USCC, *supra* note 125, at 25.

[205] The University of Miami Honor Code states that a "[s]tudent . . . where necessary, should seek to clarify what the instructor regards as proper academic conduct." It further states that a student should be guided by "common sense." UNIV. OF MIAMI, *supra* note 17.

[206] *Id.*

[207] One commentator defines whistle blowing as follows: "An employee 'blows the whistle' when, knowing that the company is engaged in serious unethical activity . . . the employee chooses to disclose the information to the public." M. VELASQUEZ, BUSINESS ETHICS: CONCEPTS AND CASES, 381 (2d. ed. 1988) (citing A. WESTIN, WHISTLE BLOWING, LOYALTY, AND DISSENT IN THE CORPORATION (1981)); F. ELLISTON ET AL., WHISTLEBLOWING RESEARCH, METHODOLOGICAL AND MORAL ISSUES (1985). The trend in whistle blowing is evident in the fact that "[t]hirty-four states have passed legislation designed to protect whistleblowers, most of which were enacted since 1980." T. Dworkin & E. Callahan, *Internal Whistleblowing: Protecting The Interests of the Employee, the Organization, And Society*, 29 AM. BUS. L.J. 267, 275 (1991). There are also "twenty federal statutes [that] offer whistleblower protection." *Id.* at 267.

[208] DEGEORGE, *supra* note 5, at 208-14.

[209] *Id.* at 210.

Conditions two[212] and three[213] pertain to the "obligation [to] minimiz[e] harm."[214] The observer should take steps to prevent the violation ("intervention").[215] In case of doubt, the observer should "confront" the alleged violator before taking the serious step of filing a formal complaint ("confrontation"),[216] and exhausting "internal" means of addressing the problem ("faculty assistance").[217] The approach fostered by these notions of "self-regulation" or "internal policing" is one that attempts to minimize the harm to all concerned parties. One commentator formulates this approach as follows: "[T]he primary goal of whistleblowing [or reporting honor code violations] is reduction of wrongdoing rather than the prosecution of wrongdoers, and the speed with which problems are addressed is significant . . . ."[218]

Thus, if the violation can be prevented or the violator immediately confronted, then it is more likely that the harm to the individuals and to the institution will be minimized. For example, if the wrongdoer can be persuaded to voluntarily admit to the violation,[219] then "the speed with which the problem [is] addressed"[220] will be drastically reduced and the "spirit of the honor code" will have been upheld.

DeGeorge's condition four[221] is that the reporter should reach a certain evidentiary threshold before being morally required to report the violation. For purposes of honor code violations, a number of factors should be considered. First, it should be clear in the observer's mind that he or she witnessed a violation and will be able to testify accordingly. Second, if it is unclear as to whether there was a violation, the student should take the added precaution of attempting to remove the suspicion. This could include confronting the violator and seeking the advice of the course instructor. However, unlike corporate whistle blowing, a student's duty to investigate should be limited. If a "strong suspicion" remains,[222] the student should report the alleged violation and have the Honor Council pursue the investigation.

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[210] "[S]ome good must be achieved to outweigh the harm that will be done." *Id.* at 208.

[211] *See supra* notes 180-83 and accompanying text.

[212] "The whistle blower should report the act immediately . . . . Reporting one's concerns is the most direct and usually the quickest way of producing the change." DEGEORGE, *supra* note 5, at 210.

[213] "One should exhaust the internal procedures and possibilities . . . ." *Id.* at 211.

[214] *Id.*

[215] *See* GUIDE FOR FACULTY, *supra* note 43.

[216] *See supra* note 117.

[217] *See* UNIV. OF MIAMI, *supra* note 17.

[218] Dworkin & Callahan, *supra* note 207, at 306.

[219] As recommended in the USCC, *supra* note 125, at 25.

[220] DEGEORGE, *supra* note 5, at 210.

[221] DeGeorge sums up his evidentiary threshold as the "evidence that would convince a reasonable, impartial observer that one's view of the situation is correct." DEGEORGE, *supra* note 5, at 212.

Finally, the student "must have good reason to believe that . . . the necessary changes will be brought about"[223] by the act of reporting. For purposes of reporting honor code violations, students must have faith in the overall honor system.[224] A student should only be morally required to report a violation in a system that is effective in punishing violators.[225]

## II. DUE PROCESS CONCERNS: HOW MUCH IS ENOUGH?

"As early as the *Magna Carta*, procedure was regarded as a valuable means for the protection of rights. . . . The time-honored phrase 'due process of law' expresses the essential *requirement of fundamental fairness*."[226]

The scope of this two-fold analysis concerns: (1) what procedural and substantive due process requirements are dictated by the Fifth[227] and

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[222] Note, that this is a lesser standard than the one prescribed to by the United States Military Honor System. That system requires the reporting of *any* suspicion, no matter the level of doubt. USCC, *supra* note 125.

[223] DEGEORGE, *supra* note 5, at 212. DeGeorge's condition number five.

[224] The University of Virginia seems to be such a system. *See supra* note 39 and accompanying text.

[225] If the honor system does not effectively prosecute code violations, then from a utilitarian perspective a student may be morally justified in not reporting a violation. The harm caused to the innocent observer (time, inconvenience, confrontation with one's peer, possible "stigma") may outweigh the benefits achieved by a lax or ineffective honor enforcement process. For example, the University of Miami Honor Code places a student complainant in jeopardy if he or she "accus[es] a student of a violation of this Code in bad faith." UNIV. OF MIAMI, *supra* note 17, at 1. Another important issue is the severity of the punishment. It should be swift and meaningful. The proverbial "slap on the wrist" may leave the reporter feeling that the process had failed. This rationale is sometimes forwarded by those who argue for an "expulsion-only" system. In short, the deterrent benefits derived from such a system are said to outweigh the harshness of the penalty in a given case. For example, the University of Virginia uses an expulsion-only penalty for those found guilty of cheating.

[226] Gorman v. University of R. I., 837 F.2d 7, 12 (1st Cir. 1988) (emphasis added).

[227] The Fifth Amendment states that no person shall be "deprived of life, liberty, or property without due process of law." U.S. CONST. amend. V. The Fifth Amendment is interpreted to pertain to actions of the Federal government.

Fourteenth Amendments;[228] and (2) whether a university should provide for a higher level of due process then is mandated by the Constitution. The question is, in short, whether the "moral minimum"[229] satisfies the earlier stated goal that the university "should emphasize fairness throughout" the Honor System.[230] In analyzing these questions we will review the case law in the area of academic misconduct and review three procedural systems: the United States Military Academy Honor System,[231] the Judicial System[232] of the University of Virginia, and the University of Miami Procedural System.[233]

## A. Procedural Due Process

The University of Virginia is a public university, the University of Miami is a private university, and the United States Military Academy ("hereinafter" USMA) represents a unique category in higher education.[234] The issue then becomes whether the same due process scrutiny applies to these different types of institutions. From a Constitutional point of view, the answer is less than clear. From the fairness perspective, the due process requirements should be the same no matter what "type" of institution. The often cited case of *Dixon v. Alabama State Board of Education*[235] held that private universities like all "private associations have the right to obtain a waiver of notice and hearing."[236] The court rationalized the distinction that because there was no government interest, the relationship between a student

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[228] The Fourteenth Amendment states that no "*State* [shall] deprive any person of life, liberty, or property without due process of law . . . ." U.S. CONST. amend. XIV.

[229] It can be argued that as a law the Constitution provides only a "moral minimum." For a discussion of the notion of the "moral minimum" in the area of ethical standards see *supra* note 88 and accompanying text.

[230] *Supra* part I.A.1.b.

[231] *See infra* Appendix C, USMA Procedural Flow Chart.

[232] The Virginia Judiciary Committee is separate and apart from its Honor Committee. "[T]he Judiciary Committee handles cases of student conduct which are blameworthy, but not necessarily matters of honor." THE JUDICIAL SYSTEM, *supra* note 99, at 4 (1989). This process was chosen for purposes of review only and to ferret out due process issues.

[233] *See infra* Appendix B, Honor Code Procedural Flow Chart.

[234] The USMA is in the "business" of granting baccalaureates and at the same time producing Army officers. The other academies include: U.S. Naval Academy, Air Force Academy, U.S. Coast Guard Academy, and the U.S. Merchant Marine Academy.

[235] 294 F.2d 150 (5th Cir. 1961).

[236] *Id.* at 156. "Notice" and "hearing" are considered the two primary components of procedural due process. *See infra* notes 245-319 and accompanying text.

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and a private university is contractual in nature and thus not subject to due process protections.[237]

However, a number of arguments have been put forward in an attempt to expand due process requirements to cover private universities. One is more of an indirect approach, the other more direct. The more indirect approach focuses on the contractual nature of the student-private university relationship mentioned in the *Dixon* case.[238] That is, a university is subject to a breach of contract cause of action if it fails to follow procedures provided in any university publications (express contract) or if it "arbitrarily interferes" with a students contractual right to a diploma (implied contract).[239] Thus, lack of sufficient due process protections can be attacked on nonconstitutional grounds.

A more direct approach has been based upon the increasingly strong interrelationships between "private" universities and the government. One commentator states:

> The years . . . [which] have also seen the expansion of the concept of 'state action' have seen tremendous growth in the connections between private schools and government in the form of grants, scholarships, and research funds. Courts are beginning to require procedural due process in actions involving private colleges and universities . . . .[240]

In essence, this argument is that most private universities should be treated as "quasi-public" institutions and therefore, subject to the requirements of Constitutional due process. Legal arguments aside, any institution of higher learning, public or private, should provide due process protection for honor code violation cases. The minimum protections required of public institutions should be endemic in the proceedings of all institutions of higher education.

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[237] *Dixon*, 294 F.2d at 157. "[R]elations between a student and a private university is a matter of contract." *Id.*

[238] *Id.* at 156. For an interesting analysis of the use of the student-university contract theory, see Corso v. Creighton Univ., 731 F.2d 529 (8th Cir. 1984).

[239] This rationale holds that there is an expressed or implied contract that the university will not arbitrarily prevent a student from obtaining a college diploma. Therefore, if a student is expelled and not given the "fair" due process requirements that may be implied from the "contract," then the university would be open to a breach of contract suit. One commentator has stated this theory as follows:

> The basic thesis of cases involving breach of an express contract [or the right to graduate based upon an implied contract right of noninterference] is that when a student matriculates at a university, he enters into a contract that he be treated in the manner outlined in relevant university publications . . . . Any violation of the procedures delineated in such publications may constitute a breach of contract.

K. FOX, *Due Process and Student Academic Misconduct*, 25 AM. BUS. L. J. 671, 699 (1988).

[240] H. GRILLIOT, INTRODUCTION TO LAW AND THE LEGAL SYSTEM 17 (2d ed. 1979).

The 1993 case of *Pike v. Gallagher*[241] is a more recent example of a long line of procedural due process cases stemming from the seminal case of *Goss v. Lopez*.[242] The *Pike* case involved the termination of a sheriff's deputy. In discussing the procedural due process issue, the Court harkens back to *Goss* by stating that "[i]t has been settled for some time that the 'root requirement' of the Due Process Clause requires 'some kind of a hearing.'"[243] The Court then lists the two traditional prongs of due process. First, "notice" of the charges must be given to the accused. Second, a "hearing" is required where the accused "is given an opportunity to present her [or his] side of the story."[244] The task at hand is to analyze the scope of the "notice" and "hearing" requirements in the context of an academic setting.

### *1. The Right to Adequate Notice*

There are a number of issues to be addressed in this "simple" and fundamental right: (1) the timeliness of the notice; (2) the adequacy of the notice in terms of the time between the "service" of the notice and the time of the scheduled hearing; and (3) whether there is a companion right to advance notice of the evidence to be presented at the hearing. We were unable to find any case dealing directly with the issue of timeliness of the notice charging a student with academic misconduct. However, from the perspective of fairness, the avoidance of unnecessary delays in the enforcement process is paramount. A timely handling of the complaint benefits both the university and the accused. It results in the quick enforcement of honor code violations, the removal of the "stigma of misconduct" from someone innocently accused, and the avoidance of long, costly adversarial-type of proceedings. Furthermore, the importance of prosecuting claims while the evidence is still "fresh" is a widely accepted principle in American jurisprudence.[245] Even though there is no court imposed "laches"[246] on the filing of a honor code complaint, most Honor Codes or other university publications provide for their own "statute of limitations" for the filing of complaints.[247]

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[241] 829 F. Supp. 1254 (D.N.M. 1993).

[242] 419 U.S. 565 (1975). The *Goss* case involved the suspension of a number of students from the Ohio public school system. The Supreme Court held that even when a case involves a suspension for only ten days, "[a]t the minimum . . . the students . . . must be given *some* kind of notice and afforded *some* kind of hearing." *Id.* at 579.

[243] *Pike*, 829 F. Supp. at 1270.

[244] *Id.* at 1271 (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985)).

[245] In the area of criminal law, the right to a speedy trial is "codified" in the Sixth Amendment: "the accused shall enjoy the right to a speedy . . . trial." U.S. CONST. amend. VI.

The issue of how much time must be allotted between the time the accused receives the charge and the hearing is more clear. In *Bleicker v. Board of Trustees of Ohio State, Etc.*,[248] the student being dismissed for a honor code violation was telephoned three days prior to the hearing of the Student Council. The Student Council found the student guilty in absentia and recommended to the Executive Committee that she be suspended. She was orally informed only two days before the Executive Committee's meeting, which was called to consider the recommendation. The court held that the shortness of the notice did not deprive the student of due process. The Court rationalized that she "was . . . well aware of the allegations of Honor Code violations."[249] The court in *Jaska v. Regents of the University of Michigan,* flatly stated that "[i]n the context of school suspensions, the starting point is *Goss v. Lopez.*"[250] In *Goss*, the court made clear that significant advance notice is not vital to meet the due process threshold for disciplinary proceedings. "There need be *no* delay between the time 'notice' is given and the time of the hearing[!]"[251]

The final issue is whether there is any companion right to advance notice of the evidence to be presented. Presently, the answer is that the student has no such right. The issue was raised in the case of *Goldberg v.*

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[246] "Laches" is the common law doctrine which prevents the prosecution of a claim that has become too "old." It is the "failure to prosecute [a] claim within [a] reasonable and proper time." BLACK'S LAW DICTIONARY 1016 (4th ed. 1968).

[247] For example, the University of Michigan provides for a *six week* period for a hearing to be held from the date of the charge. Jaska v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1251 (E.D. Mich. 1984); The University of Miami Honor Code states that "[i]f substantial time has elapsed between the occurrence of the alleged violation and the filing of the complaint, the [Honor] Panel shall dismiss the complaint if . . . the passage of time has materially prejudiced its ability to reach a fair and accurate decision." UNIV. OF MIAMI, *supra* note 17, at 6. The University of Virginia Judicial System provides: "A complaint must be filed within 45 calendar days of the date the identity of the alleged offender is known." THE JUDICIAL SYSTEM, *supra* note 99, at 7.

[248] 485 F. Supp. 1381 (S.D. Ohio 1980).

[249] *Id.* at 1384.

[250] *Jaska*, 597 F. Supp. at 1248.

[251] *Goss*, 419 U.S. at 582. However, the Court made clear that some greater amount of advance notice *may* be required in other situations. *Goss* involved only a 10 day suspension. Justice White stated that "longer suspensions *or expulsions* . . . may require more formal procedures." *Id.* at 585 (emphasis added). It should be noted that this case involved a suspension *without* any notice or hearing. Therefore, this admonition of Justice White should be taken in view of the totality of the possible procedural safeguards covered under due process and not just to the area of notice. In fact, the case focuses more on the "hearing" component of due process than the "notice" issue.

*Kelly*[252] which involved the government's termination of the plaintiff's welfare benefits. The Supreme Court determined that fundamental fairness dictated "timely and adequate notice *detailing the reasons*"[253] for the termination of the benefits. Such a right has not been extended to the area of honor code violations. The Fifth Circuit in *Keough v. Tate County Board of Education*,[254] intimated that the student should be advised of the adverse witnesses and the substance of their testimony. However, the case says "nothing about pre-hearing disclosure."[255] Therefore, the court in *Nash v. Auburn University*[256] concluded that there was no "requirement that students accused of cheating be given this pre-hearing information."[257]

The schools reviewed ranged from giving little pre-hearing information to complete disclosure. The University of Miami Honor Code provides that the accused student shall be given a copy of the complaint but, "shall not be given the name of [the] student complainant . . . unless there is a determination of probable cause."[258] In comparison, the University of Virginia Judiciary Committee Constitution provides that the accused shall be "given a written summation of the charges . . . [shall be] given the name of . . . his accuser . . . [and shall be] informed of the nature of the evidence to be used against him."[259] Although not Constitutionally required, the procedural protections found in the "Virginia System" are preferable under our heightened fairness perspective that should apply to institutions of higher education.

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[252] 397 U.S. 254 (1970).

[253] *Id.* at 267 (emphasis added).

[254] 748 F. 2d 1077 (5th Cir. 1984). *See also* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961).

[255] Nash v. Auburn Univ., 621 F. Supp. 948, 954 (D.C. Ala. 1985).

[256] *Id.*

[257] *Id.* The court reasoned to require such pre-hearing disclosure "would afford [students] more rights than one accused of a crime . . . ." *Id.* *See also Bleicker*, 485 F. Supp. 1381 (S.D. Ohio 1980) (where the student was not given any written statement of the charge against her).

[258] UNIV. OF MIAMI, *supra* note 17, at 5. Probable cause is determined at the Preliminary Hearing which the accused student may attend. *Id.* at 6.

[259] THE JUDICIAL SYSTEM, *supra* note 99, at 9.

### 2. *The Right to a Meaningful*[260] *Hearing*

Before we can determine the requirements needed for a "meaningful hearing," it would be useful to define the nature of Honor Committee Hearings specifically, and of academic disciplinary proceedings in general. Is a case involving the penalty of expulsion akin to a criminal proceeding, more akin to an administrative proceeding, or something "less"[261] than an administrative proceeding? The answer seems to be the latter of these three alternatives. The Court in *Board of Curators of University of Missouri v. Horowitz*[262] indicated that academic proceedings are to be viewed in a special light. "A school is an academic institution, not a courtroom or administrative hearing room."[263] However, this should not be taken to mean that due process requirements are to be disregarded. Furthermore, it should not be implied that there are fixed, uniform procedures to be employed for all types of academic proceedings. In fact, the courts have implemented a sort of "sliding scale" in determining what due process protections are to be accorded a student in a given proceeding. "The demands of due process . . . are greater when . . . the severe sanction of expulsion rather than a form of milder discipline [is involved]."[264] In *Henderson State University v. Spadoni,*[265] the court used the following approach in determining what due process safeguards should be required: "Flexibility and elbow room are to be preferred over specificity . . . ."[266]

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[260] This notion of "meaningful" was noted in Bell v. Burson, 402 U.S. 535 (1971) (case involved a state's procedure for the termination of driver licenses). "The hearing required by the Due Process Clause must be 'meaningful.'" *Id.* at 541 (citing Armstrong v. Manzo, 380 U.S. 545 (1965)). The court in *Jaska* stated that a school disciplinary hearing must give the accused student "a meaningful opportunity to present his side of the story." *Jaska*, 597 F. Supp. at 1250.

[261] By "less" we are referring to the notion of the "flexible nature" of the Due Process requirements. A criminal proceeding requires the full panoply of due process protections. An administrative proceeding requires something less in due process protections because of the difference in the severity of the punishment that can be rendered. For example, "[T]he question presented is whether, in the particular case, the individual has had an opportunity to . . . defend, and not whether the hearing mirrored a common law criminal trial." *Gorman*, 837 F.2d at 14.

[262] 435 U.S. 78 (1978).

[263] *Id.* at 87. The oft-cited phrase in *Goss* used to rationalize relaxed Due Process requirements in academic hearings is that "further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process." *Goss*, 419 U.S. at 585. However, some courts have agonized academic proceedings to administrative hearings. *See, e.g.*, *Gorman* 837 F.2d at 16. "A major purpose of the . . . administrative hearing, is to avoid the formalistic adversary mode of procedure." *Id.*

[264] Hagopian v. Knowlton, 470 F.2d 201 (2d Cir. 1972). The court gave an example of this "sliding scale." That when expulsion is a possibility, a hearing with the "opportunity to bring witnesses [is required] . . . written submissions are wholly unsatisfactory . . . ." *Id.* at 211.

[265] 848 S.W.2d 951 (Ark. Ct. App. 1993).

Thus, it is clear that the proceeding "may be procedurally informal"[267] and may vary from context to context.[268] However, it is equally clear that *some* sort of procedural safeguards are required under the Due Process Clause. Furthermore, other procedural protections may be prudent under an academic "fairness" perspective. The framework for our procedural due process analysis will be: (1) the procedural protections required under the Due Process Clause; (2) the procedural protections that should be considered, albeit not required; and (3) the procedural safeguards that should be disregarded due to the fact-finding, nonadversarial nature of the academic setting.

### a. The Right to Cross-Examination

The area pertaining to whether a student has a right to cross-examine witnesses is confused. It is rare to find a case or Honor Code that does not allow the student the opportunity to cross-examine witnesses. But, the question remains whether the right to cross-examination is Constitutionally mandated in an academic disciplinary proceeding. One District Court emphatically answers the question in the negative: "[N]either the Fifth Circuit, the Eleventh Circuit, nor the Supreme Court has expanded the rule in *Dixon*[269] to require cross-examination and confrontation of witnesses in the context of school disciplinary proceedings."[270] However, most courts hold the right to cross-examine witnesses in high esteem. "Certainly, the cross-examination of witnesses is an important notion in our traditional concept of justice and fair play."[271] Thus, it is unclear how a majority of courts would handle a case involving the expulsion of a student who was not given the opportunity to cross-examine witnesses. We would not be surprised if many of them did not indeed "expand the rule in *Dixon*" to include the right to cross-examination. This is an area of due process in which universities should heed the advice of one commentator who remarked that "perhaps the best advice that can be given is that it is safer to err on the side of giving students too many rights, rather than too few."[272]

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[266] *Id.* at 953. The court further stated that "[a] full-dress judicial hearing is not required." *Id.* (citing *Dixon*, 294 F. 2d at 159).

[267] Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967). Judge Moore states that "the flexibility which is inherent in the concept of due process . . . precludes the dogmatic application of specific rules." *Id.* at 811.

[268] By "context" we are referring to the notion that academic proceedings vary in the subject matter of the claims in question. They range from the "purely academic," in, Regents of University of Michigan v. Ewing, 474 U.S. 214 (1985) (dismissal from medical school due to poor academic performance) to a "disciplinary" dismissal in University of Texas Medical School v. Than, 834 S.W.2d 425 (Tex. Ct. App. 1992) (expulsion for cheating on an exam). This "context" is a major factor in determining the procedural safeguards to be afforded. "A procedural rule that may satisfy due process in one *context* may not necessarily satisfy . . . due process in every case." *Bell*, 402 U.S. at 540 (emphasis added).

[269] *Dixon*, 294 F.2d at 150.

[270] *Nash*, 621 F. Supp. at 955.

Under the notion of fairness, universities should feel obligated to provide cross-examination. The Honor System should not only stress fairness in its educational and enforcement functions, it should also foster the "appearance" of fairness. Denying an accused student the opportunity to cross-examine witnesses would likely damage that "appearance." Professor Seavey states this notion of fairness eloquently, "[i]t is shocking that the officials of a[n] . . . educational institution . . . should not understand the elementary principles of fair play."[273]

### b. The Right to Representation[274]

In one of the earlier cases dealing with the right to representation, *Wasson v. Trowbridge*,[275] the Second Circuit held that "where the proceeding is non-criminal in nature, where the hearing is investigative and not adversarial and the government [or school] does not proceed through counsel, . . . due process does not require representation by counsel."[276] The Tenth Circuit, more recently, held that Air Force Cadets do "not have a Constitutional right to be represented by retained counsel."[277] Finally, the court in *Nash* after reviewing the case law states that "the great majority of cases support the conclusion that students facing disciplinary charges have no absolute right to have an attorney present their case."[278] This determination that there is no right to counsel seems to be more in line with the dictate of *Goss* that there be "an informal give-and-take between student and disciplinarian."[279]

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[271] *Id.* Ironically, this dicta is found in the *Nash* case which failed to extend *Dixon* to include the right to cross-examination. *Id.*

[272] Fox, *supra* note 239, at 700.

[273] Warren A. Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406, 1407 (1957).

[274] The right to representation in the academic setting may or may not mean the representation by an attorney. Some Honor Systems provide for non-attorney representation. For example, the University of Virginia Judicial System provide "Judiciary Counselors" to both the complainant and the accused. These "student counselors are well-versed in Judiciary policy and trial procedure." THE JUDICIAL SYSTEM, *supra* note 99, at 7.

[275] 382 F.2d 807 (2d Cir. 1967).

[276] *Id.* at 812.

[277] 718 F. 2d 348, 350 (10th Cir. 1983).

Does the notion of academic fairness prescribe that universities allow students to be represented by attorneys at Honor Committee Hearings? Judge McKay's dissent in *Rustad v. United States Air Force* argues that the additional costs and inconvenience to the institution is not such as to outweigh the importance of this procedural protection. The right to be represented by counsel "will do [no] harm to the conduct of the affairs of the Academy."[280] However, one can argue that the informal, nonadversarial atmosphere of the Honor Committee would be negatively impacted by the presence of attorneys.[281] It would seem that a well-structured student-run Honor System in which the accused is given notice and a hearing, along with the right to cross-examine adverse witnesses, satisfies the notion of academic fairness.[282]

### c. The Standard of Review

This area of procedural due process is another where the courts have given a great amount of deference to the university. In doing so, the standard or "balance" of evidence needed to find someone guilty of an honor code violation still remains unsettled. There is an entire litany of standards to choose from, such as the criminal law standard of "beyond a reasonable doubt," the "clear and convincing" standard,[283] the

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[278] *Nash*, 621 F. Supp. at 957. *See also Wasson*, 382 F.2d at 807; Henson v. Honor Comm. of Univ. of Va., 719 F.2d 69 (4th Cir. 1983); Madera v. Board of Educ., 386 F.2d 778 (2d Cir. 1967); Barker v. Hardway, 283 F. Supp. 228 (S.D.W. Va. 1968); Due v. Florida A & M Univ., 233 F. Supp. 396 (N.D. Fla. 1963). *But see* Esteban v. Central Miss. State College, 415 F.2d 1077 (8th Cir. 1969); Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972).

[279] *Goss*, 419 U.S. at 585.

[280] *Rustad*, 718 F.2d at 351.

[281] Whether, real or imagined, the presence of attorneys seem to make proceedings more adversarial in nature. The Lawyer's Code of Professional Responsibility commands that "a Lawyer should *represent a client zealously*" MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980) (emphasis added).

[282] Judge McKay does illustrate the occasion when attorney representation should be allowed. That occasion is when an attorney is used elsewhere in the Honor Committee or disciplinary process. For example, if the university or the complainant is represented by counsel. In *Rustad*, Judge McKay placed heavy emphasis on the fact that the hearing officer was an attorney. *Rustad*, 718 F.2d at 351 (McKay, J., dissenting).

[283] The "clear and convincing" standard of evidence is more demanding than "preponderance of the evidence." It is sometimes used as the standard of proof in the area of "equitable doctrines" (e.g. resulting trusts, specific performance, and adverse possession). *See, e.g.*, 23 FLA. JUR. 2d

"preponderance of the evidence" (the civil law standard), and the "substantial evidence" standard (the administrative law standard).[284] Given the nature of the academic proceeding[285] and the great deference the courts have given to them,[286] the least demanding of these standards seem to be all that will be required. The court in *Gorman v. University of Rhode Island*[287] held that "due process requires . . . colleges to base their suspension decisions on 'substantial evidence.'"[288]

Despite the deference paid to institutions of higher education by the courts, some universities have elected to use more demanding standards of proof than that of "substantial evidence."[289] The University of Miami requires a finding of "clear and convincing evidence."[290] The University of Virginia[291] and the United States Air Force Academy require a finding of guilt "beyond a reasonable doubt."[292] From the perspective of academic fairness, the use of the "substantial evidence" standard is not abhorrent. However, when the severity of the punishment rises to the level of expulsion, the "clear and convincing" standard or the "beyond a reasonable doubt" standard would be preferred. First, requiring a higher degree of proof does not "further formaliz[e] the . . . process."[293] Second, it supplies added protection to a process lacking some of the procedural protections

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*Evidence and Witnesses* § 382 (1980).

[284] For an outstanding review of these different standards of review in the academic setting, *see* Fox, *supra* note 239, at 686-87, n.108.

[285] The informality of the academic proceeding is akin to an administrative proceeding. *See supra* notes 261-67 and accompanying text.

[286] "There is a general policy against intervention by the courts in matters best left to school authorities." *Henderson State Univ.*, 848 S.W.2d at 953.

[287] 646 F. Supp. 799 (D.R.I. 1986).

[288] *Id.* at 813.

[289] "Substantial evidence" is the standard used at the USMA. The Honor Code educational pamphlet defines substantial evidence as "a greater weight of evidence than supports a contrary conclusion." USCC, *supra* note 125, at 35. To find that a cadet has committed an honor violation, the members of the Investigative Hearing must determine that the cadet committed "the act" and possessed "the intent to have committed the act." *Id.* at 29-30.

[290] UNIV. OF MIAMI, *supra* note 17, at 8.

[291] The Virginia Judicial System only provides that there "must be agreement of 2/3 of the trial panel" to assess guilt. THE JUDICIAL SYSTEM, *supra* note 99, at 8. However, the separate Honor Committee System requires a finding of guilt "beyond a reasonable doubt" by a "4/5ths [vote] of the committee members." Henson v. Honor Comm. of Univ. Va., 719 F.2d 69, 73 (4th Cir. 1983).

[292] "The standard for determination of guilt is that of reasonable doubt and a unanimous vote of the board . . . ." Birdwell v. Schlesinger, 403 F. Supp. 710, 715 (D. Colo. 1975).

[293] *Goss*, 419 U.S. at 585.

found in more adversarial proceedings.[294] The severity of the expulsion sanction makes this a reasonable and fair accommodation.[295]

### B. Substantive Due Process

Our analysis will focus on two aspects of substantive due process review of honor committee actions. First, can the Honor Code itself be attacked because it is "poorly"[296] written from a substantive due process perspective. Are the prohibitions enumerated in the honor code "so vague that [persons] of common intelligence must guess at its meaning[?]"[297] If so, then it would be an affront to substantive due process. This was the argument used by an Air Force cadet in *Birdwell v. Schlesinger*.[298] The cadet was found guilty of a form of lying known as "quibbling."[299] He unsuccessfully claimed that he was denied substantive due process because the Academy's standard of conduct pertaining to lying was "vague, uncertain and nebulous."[300] The court looked at the "totality of the circumstances" in determining that the standard of conduct prohibiting a form of lying known as "quibbling" was *not* so vague as to constitute a denial of substantive due process. The court noted that the Honor Code was a "self imposed" system,[301] that the Honor Code, including the conduct of "quibbling," is "explained in an Honor Reference Handbook made available to all cadets,"[302] that guilt requires a finding beyond a "reasonable doubt," and it must be by "a unanimous vote" of the Board of Officers.[303] Nonetheless, the Honor Code should be clear as to the standards of conduct prohibited. The importance of a strong "educational support system" will help overcome the definitional shortcomings that are likely to be a part of any honor code. Furthermore, *Birdwell* seems to indicate that strong procedural protections, such as the "beyond a reasonable doubt" standard, may impact upon the degree of scrutiny a court applies to a substantive due process claim.[304]

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[294] We have chosen to review what we considered the three most important procedural due process concerns: (1) the right to cross-examination, (2) the right to representation, and (3) the standard of review. However, a number of other "less important" due process issues have been addressed by the courts. *See, e.g.*, *Gorman*, 837 F.2d at 15–16 (the lack of a written transcript is not fatal, however, the student *may* have a right to tape record the proceedings); *Univ. of Texas Med. Sch.*, 474 U.S. at 431 (a university's failure to follow its own procedures does "not *per se* violate due process,") *Birdwell*, 403 F. Supp. at 715 (an Air Force Cadet has no privilege against incrimination).

[295] An associated issue is what number of votes is required to satisfy due process. In *Roberts v. Knowlton*, the court held that "less-than-unanimous" verdict does not violate due process. 377 F. Supp. 1381, 1385-86 (S.D.N.Y. 1974). However, schools have enacted numerous voting requirements: the Air Force Academy (unanimous vote), *Birdwell*, 403 F. Supp. at 714; University of Virginia Honor Committee (4/5ths vote), *Henson*, 719 F.2d at 73; University of Virginia Judiciary Committee (2/3rds vote), THE JUDICIAL SYSTEM, *supra* note 99, at 8; USMA (2/3rds vote), USSC, *supra* note 125, at 33; University of Miami (5 of 7 or 4 of 6). Needless to say, the combination of voting requirements and possible standards of review is nearly endless. It is the responsibility of the student body to determine the mix which satisfies the notion of academic fairness. For example, the heightened review of "reasonable doubt" may be tempered by a less-than-unanimous vote requirement or the less strict "substantial evidence" standard can be "strengthened" by requiring a unanimous vote.

[296] "Poorly" usually refers to a statute or regulation that is too broadly or vaguely written. The courts have held this to be a fatal flaw: "language [which is] vague and without any standard or guidelines whatsoever . . . is unconstitutional as violative of the due process . . . clauses of the [U.S.] Constitution." GRILLIOT, *supra* note 240, at 15 (citing People v. Moore, 377 N.Y.S.2d 1005 (1975)).

[297] *Id.* at 14.

[298] 403 F. Supp. 710 (D. Colo. 1975).

[299] "Quibbling" is defined in the Air Force Academy Honor Reference Hand Book as a form of lying in which one "create[s] a false impression in the mind of his listener by cleverly wording what he says, omitting relevant facts, or telling partial truth." *Id.* at 714.

[300] *Id.* at 717.

The second aspect of substantive due process to be discussed is the application of the traditional "arbitrary and capricious"[305] standard to academic dismissals for honor code violations. The law remains unsettled as to whether such dismissals are subject to substantive due process review. The 1993 case of *Donnell v. Illinois State Board of Education*[306] stated that "the Supreme Court has never definitively stated whether . . . an education is a fundamental right."[307] However, the court in *Bleicker*[308] stressed the fact that the *Horowitz*[309] court "appeared to countenance lower court dicta that academic dismissals can be enjoined upon *a clear showing that they are arbitrary and capricious*."[310] Despite this uncertainty, it is clear that the vast majority of courts are unlikely to give "heightened scrutiny"[311] to substantive due process claims involving expulsions for honor code violations. "There is a general policy against intervention by the courts in matters best left to [the schools]."[312]

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[301] *Id.* at 714.

[302] *Id.*

[303] *Id.* at 715.

[304] Justice Powell, in Regents of University of Michigan v. Ewing, argues that there is no such substantive due process protection mandated for cases involving academic disenrollment. "[The student's] claim to a property right is dubious at best. . . . Even if one assumes the existence of a property right [to continued enrollment], not every such right is entitled to the protection of substantive due process." *Regents*, 474 U.S. at 229 (J. Powell, concurring).

[305] If a decision is determined to be "arbitrary and capricious," then it is said to violate substantive due process. *Nash*, 621 F. Supp. at 958; *see generally*, Fox, *supra* note 239.

[306] 829 F. Supp. 1016 (N.D. Ill. 1993). This case involved educational rights of school-aged pretrial detainees in county jail.

[307] *Id.* at 1018.

[308] *Bleicker*, 485 F. Supp. at 1381.

[309] *Horowitz*, 435 U.S. at 18.

[310] *Bleicker*, 485 F. Supp. at 1381.

However, it is probably unwise to find too much comfort in this judicial "presumption" in favor of the sanctity of academic disciplinary decisions. Lack of "close scrutiny" should not be confused with no scrutiny! The courts are likely to intervene if there is a serious substantive breach. The court in *Alabama & Coushatta Tribes v. Big Sandy School District*,[313] listed two theories upon which one may make a successful substantive due process claim. First, "if the suspensions were patently unreasonable or disproportionate to the offense, the [students] would be entitled to relief."[314] Second, if there was "a substantial departure from academic norms,"[315] the student would also be entitled to relief. The first theory is one that would likely prove unsuccessful in the area of honor code violations. The most severe of penalties, that of expulsion, has been upheld many times by the courts.

The second theory is more likely to be successful on a number of fronts. If adequate procedural safeguards are lacking, then the court may find that a student was illegally deprived of a substantive right. The court in *Bleicker* formalized this ground of attack as follows: "The risk that the procedures used would erroneously deprive [someone] of her interest."[316] As previously determined, a university is likely to sustain this type of attack as long as it provides the student with notice of the charges, an opportunity to be heard, and an opportunity to cross-examine witnesses.

Another possible deviation from "academic norms" would be if a school did not follow its own procedures. The courts are unlikely to sustain a substantive due process claim simply because a school did not follow their own published procedures or if they selectively used certain procedural safeguards.[317] This issue was posed in *University of Texas Medical School v. Than*, where procedures were above due process minimums, but were not uniformly applied.[318] The United States Supreme Court had previously concluded that without more, this does not violate due process. Justice Powell explained the Court's reluctance to enter this area of academic proceedings stating, "[t]he history of substantive due process 'counsels caution and restraint.'"[319]

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[311] "Heightened scrutiny" is the form of careful review that courts give to certain fundamental rights or interests. Justice Powell argues in *Ewing* that "the interest . . . in continued enrollment . . . bears little resemblance to the fundamental interests that previously have been viewed as implicitly protected by the Constitution." *Ewing*, 474 U.S. at 229.

[312] *Henderson State Univ.*, 848 S.W.2d at 953.

[313] 817 F. Supp. 1319 (E.D. Tex. 1993). This case involved the suspension of Native-American students for violating a school's dress code.

[314] *Id.* at 1335.

[315] *Id.*

[316] *Bleicker*, 485 F. Supp. at 1388. The Court advised the university to review the procedural protections afforded its students: "[The University] would be well advised to adopt additional procedures as a matter of routine, for under certain circumstances these relatively inexpensive safeguards might contribute to protecting an important . . . interest." *Id.*

## CONCLUSION

For better or for worse, honor codes, ethical codes, industry codes, and mission statements continue to appear in society. The objective of these exercises is not always clear. Some organizations feel compelled to express their standards of expected behavior in a formal, ritualistic way. Academic institutions place particular analytical challenges to the objectives and efficacy of such exercises. By examining the different substantive and procedural components of the honor code system, this article has attempted to sensitize the reader to the issues involved in formulating and operating a honor code system.

There are no superior alternatives, as we see it, to the use of academic honor codes. It is the hope that the different actors in the honor system process will become more sensitized to the important roles they play in increasing the effectiveness and meaningfulness of the system. The effectiveness of honor systems could be improved with the addition of several common sense features. Employing these features requires the establishment of an official, full-time position dedicated to the operation of the honor system. This "honor system ombudsman"[320] could serve a number of important functions in the area of education, enforcement, counseling, and monitoring. This official would be entrusted to develop and coordinate the educational support system. His or her office would be able to provide unbiased counsel to those contemplating the filing of a honor code complaint and assist all those involved in the enforcement process. Finally, she should be required to monitor the effectiveness of the honor system and to collect data to be used in an on-going evaluation. This data base should include the number of reported cases, the number of student and the number of faculty complainants, the type of misconduct involved, the "conviction" rate, the penalties assessed, along with student and faculty surveys as to their knowledge of the honor code and their efforts in complying with its dictates.

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[317] As noted earlier, the university may be vulnerable to a "breach of contract" claim based on this set of facts. *Supra* notes 238-240 and accompanying text.

[318] *Than*, 834 S.W.2d at 431.

[319] 474 U.S. at 229 (citations omitted).

[320] The use of the term "ombudsman" is often used to refer to an independent, unbiased office or individual that persons may seek advice or file a complaint. For example, it is often a government office in the Scandanavian countries used to handle consumer complaints such as the existence of antitrust violations. E.g., Sweden's Freedom of Commerce Ombudsman. L. DiMatteo & K. Furry, *Reciprocity: A Workable Standard For Foreign Government Antitrust Standing?*, 15 CORNELL INT'L L.J. 355, 378 (1982). One definition of "ombudsman" is "[a]n official or semi-official office to which people may come with grievances connected with the government." BLACK'S LAW DICTIONARY 979 (5th ed. 1979).

This on-going evaluation should be institutionalized as a periodic review of the school's honor system. The school's "ethics officer"[321] can provide strategic and informational support. However, this periodic review should involve all members of the university community. The Greek philosophers provide the philosophical underpinning to the importance of continued reassessment and study of the school's honor code: "Each generation in turn is constrained to try to reconcile the truth the spirit knows with the truth the mind knows, to make the inner world fit into the ever-changing frame of the outer world."[322] The academic honor code is here to stay. It is our hope that all those involved in the honor code process, students, faculty and administration, will heed these wise words. Whether the honor code is transformed from an empty script of aspirational jargon to a "living document" that will expand the ethical horizons of the student body, will require the dedication and energy of the entire university community.

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[321] The use of ethics officers (or ombudsman) in the corporate world is on the rise. "In the corporate world, more companies are appointing ethics officers . . . ." In fact, there is a "2-year old Ethics Officers Association . . . ." T. Billitteri, *Morality: Back in Style or Just a Fad?*, TIMES PUBLISHING COMPANY (Tampa ed.), Feb. 12, 1994, at B8.

[322] HAMILTON, *supra* note 1, at 337.

## APPENDIX A

## DR. ROBERT MORROW'S EXAM: AN ETHICAL CASE STUDY OR ACADEMIC TESTING: THE LAST TRIAL BEFORE ENGAGING THE "REAL WORLD?"

### PROLOGUE

When a university tests its students, it provides them with an opportunity to examine their personal moral codes. In fact, one may argue that academic testing is the final opportunity to affect a student's ethical mind-set and behavior before he or she graduates into the "adult world." One may reason that students are not fully aware of the many moral and practical implications of their decisions. It is the purpose of honor codes to sensitize students to the ethical implications of their actions. The following hypothetical case on classroom cheating will be used to examine the different substantive and procedural issues raised in the text.

### THE FACTS

Summa University, a private university located in suburban Buffalo, New York was established in 1905. In 1907, the student government ratified a Student Honor Code that prohibited "stealing, lying, and cheating." It also required students to report any honor code violations that they observe. The University's Board of Trustees enacted the Honor Code that same year. The Code provides for an expulsion-only penalty for those found guilty of cheating. A vote of 2/3rds of the Honor Committee of a finding of "clear and convincing evidence" is needed.

*Dr. Robert Morrow*, a tenured professor and renowned scholar, teaches an undergraduate business course to a class of 104 students. In preparing his mid-term examination, he used a composite of questions taken from his past exams. Dr. Morrow delegated the task of copying the exam to *Faust*, the department's work-study student. *Cain*, a student in the school's business program, noticed Faust copying the exam and "took" a copy when Faust was briefly called away. Cain sold the copy to *Abel*, one of Dr. Morrow's students. Faust's girlfriend, *Delilah*, was also in Dr. Morrow's class. She was having a difficult time understanding the course material. Faust, out of sympathy and loyalty, informed Delilah of the specific subjects that were to be covered on the exam. *Flavius*, another student in Dr. Morrow's class, used his fraternity's past exam file system to study copies of previous exams given by Dr. Morrow. The exam was solely administered by *Samson*, Dr. Morrow's graduate assistant. Samson used the "spare time" to prepare for a job interview. During the exam, *Benedict*, noticed *Karen* looking at what appeared to be a "crib-sheet."

## THE ISSUES

This fact pattern raises a number of honor code and ethical questions. Based on our earlier analysis which of the parties are guilty of an ethical breach of the Honor Code? The Professor? The Work-Study? The Graduate Student? The Students? We believe that the previous analysis would require the "foreman of the jury" to read the verdict in a clear and loud voice: "Guilty on all charges!" The following premises were examined in the text and will be applied to this fact pattern.

### Premise 1

The underlying Student-University "compact" mandates that exams are to be used to test a student's knowledge of the subject matter and that grades will be assigned "based on merits."

### Premise 2

Premise 1 requires that both the professor and his or her students be responsible for the internal integrity of examinations and other assignments. The professor is primarily responsible for the proper preparation, administration, and grading of exams. The students are not to obtain an unfair advantage in the preparation and the taking of an exam.

### Premise 3

Violations of the fundamental ingredients of the Honor Code harm all the concerned parties: the violator, the innocent observer, other innocent students, and the university. Therefore, all students and faculty have a duty to report observed violations of the Honor Code.

### The Players

*Professor Morrow:* Dr. Morrow is guilty of lack of good sense. His lax preparation and administration of the examination made it easy for the "bad" students to cheat. He also failed in his obligation to "run a tight ship" and to try to remove the "temptations" to cheat. As we saw in the Naval Academy scandal, the use of past examinations as a "test bank" is not appropriate. Dr. Morrow should prepare a new examination and not reuse past exam questions. Also, delegation in the preparation and administration of the exam should be limited. For example, Dr. Morrow should do his own copying, store the exams securely, and proctor the exam himself. Given the size of the class, it would be prudent to have the graduate student assist him in the proctoring and to have a number of versions of the exam.[323]

*Cain:* He is guilty of stealing the exam for profit. This conduct should result in an expulsion. In fact, this may be a case of criminal misconduct and should be referred to the proper authorities.

*Able:* Abel is guilty of a clear breach of the honor code, the purchasing of an exam in order to cheat. Under our utilitarian analysis it was determined that such conduct harms not only the innocent students but also, the violator. He is in essence cheating himself of an education with likely repercussions when he enters the workforce.[324] "He is most cheated who cheats himself."[325]

*Faust:* Faust is guilty on two fronts: (1) leaving the exam unattended and (2) communicating the exam questions to Delilah. The first is an example of poor judgement and should not be considered an honor code violation. The second is an example of someone not personally benefiting from his own wrongdoing. Faust believed that his motives of "sympathy and loyalty" were altruistic. This can be compared to the notion of "insider trading" in the securities investment industry where a friend communicates inside information to another friend who may be down on his luck. The "tipper" would still be guilty of insider trading because she provided "nonpublic information" and breached her "fiduciary duty" to her employer and to the stockholders of the company affected.[326] Faust, should be punished accordingly for breaching his duty as a work-study and by providing another student with "inside information" of an exam.

*Delilah:* Although she never received any written material pertaining to the exam, her use of the information provided by Faust was cheating. This would be so even if Faust had "volunteered" the information. Delilah had the duty to inform Dr. Morrow that his exam had been compromised and also to report Faust as required by the "nontoleration" clause of the Code.

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[323] The University of Miami Faculty Guide gives a number of suggestions for administering exams to large classes. Guide For Faculty, *supra* note 43, at 4.

[324] One commentator describes this self-inflicted harm: "CHEATING on school examinations results in inaccurate evaluation of achievement as well as an attenuation of effort toward mastery of the subject matter on the part of the student." C. Fischer, *Levels of Cheating Under Conditions of Informative Appeal to Honesty, Public Affirmation of Value, and Threats of Punishment*, 64 J. Educ. Research 12, 12 (1970).

[325] J. Griffith, Business 152 (1990) (quoting L. Drozd).

[326] Corley et al, *supra* note 11, at ch. 19.

*Flavius:* His situation presents an ethical "gray area." Unless, the use of past exams as study aids is prohibited under the Honor Code, Flavius was innocent of wrongdoing in studying the old exams.[327] In essence, the old exams became part of the public information and are no longer the "property" of Dr. Morrow. Thus, the importance of preparing new exams is paramount to insure its integrity. If a question that Flavius studied prior to the exam had been reused by Dr. Morrow, is there then a honor code violation? There seems to be no direct violation of the honor code by Flavius. The old exams were public information, they were not stolen, and Flavius did nothing deceitful. Therefore, under the "Letter of the Code" there was no act of cheating. However, one may argue that under the "Spirit of the Code"[328] Flavius should notify the Professor of his "unfair" advantage. He still would not be guilty of a code violation. But, the Professor would be able to declare the exam compromised, disregard it, and administer a new exam.

*Samson*: A study in the area of educational psychology has shown that exams that are not well proctored result in greater instances of cheating. "An inflation of typical cheating incidence since the situations would tend to promote cheating by an inattentive proctor . . . ."[329] Samson is not guilty of an honor code violation, but is guilty of breaching his "fiduciary duty" to the school by improperly proctoring the exam. However, one can argue that Dr. Morrow is ultimately the responsible party. As the course Professor, it is his responsibility to implement the proper "preventive" safeguards[330] to insure the integrity of the exam.

*Karen:* She is guilty of cheating by using an improper aid, the "crib or cheat sheet." If found guilty, she should be severely punished if the Honor Code is to have its intended deterrent effect. One study showed "[t]hat Threats of Punishment resulted in significant fewer students cheating."[331]

*Benedict*: This is a classic case of a student's obligation under the Honor Code's "nontoleration" clause. Benedict can try to "intervene" by telling Karen to remove the "crib-sheet" from view or if in doubt he could approach Karen after class and "confront" her for an explanation. If a suspicion remains he should consult with Dr. Morrow, seek the advice of the

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[327] In fact, at the U.S. Naval Academy this practice of studying old exams is known as "gouging." "Middies are permitted to use 'gouge.'" D. Glick & B. Turque, *Sailing Through Troubled Seas*, NEWSWEEK, Sept. 27, 1993, at 44.

[328] *See* USCC, *supra* note 125.

[329] E. Hetherington & S. Feldman, *College Cheating As A Function Of Subject and Situational Variables*, 55 J. EDUC. PSYCH. 212, 214 (1964).

[330] *Supra* notes 142-153 and accompanying text.

[331] Fisher, *supra* note 324, at 14.

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school's "ethics officer," or file a complaint with the Honor Committee. Benedict could have wisely and discreetly informed the proctor of his suspicions during the exam. The proctor could than have monitored the situation and attempted to catch Karen using the "crib sheet."

## EPILOGUE

This exercise has illustrated that for a Honor Code to be effective, all the different parties in the university community must assume their fair share of the responsibility. The Honor System is an example of the adage that the whole chain is only as strong as its weakest link. The Honor Code must be *made* a "living document." It will not come "alive" if a university simply points to it in principle and aspire to its goals but does not fully commit to the challenges effectiveness demands. Dr. Morrow's Exam is an example of an honor system that has failed both from a "security" and educational perspective. At the least, security should be tightened to secure the integrity of the exam and to protect the hard working, honest students. However, if we hope to encourage our students to obtain Professor Kohlberg's "Sixth Stage of Moral Development," the honor code and the ethical dilemmas surrounding it can be one way of creating a "state of disequilibrium," where assumptions are challenged, critical thinking is demanded, and moral growth is encouraged.[332] This can only be achieved by way of the implementation of a vibrant educational support system, the "enculturation" of the "spirit of the code" throughout the institution, and the presence of a viable enforcement process supported by severe sanctions.

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[332] L. Kohlberg, *The Claim to Moral Adequacy of a Highest Stage of Moral Judgement*, 70 J. PHIL. 630 (1973). Professor Kohlberg defines the sixth and most advanced stage of moral development as "the universal-ethical-principle orientation" stage. In this stage the individual resolves ethical issues by a "decision of conscience in accord with self-chosen ethical principles appealing to logic . . ., universality, and consistency." *Id.* at 632; *See also* L. Kohlberg, *Stage and Sequence: The Cognitive-Developmental Approach to Socialization*, HANDBOOK OF SOCIALIZATION THEORY AND RESEARCH (D. Goslin ed., 1969).

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# The Constitution Comes to Campus: Due Process and Student Disciplinary Rules[1]

## Part I

by
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Few aspects of higher education have changed more profoundly over the last thirty years than the student disciplinary process. While colleges and universities continue to enjoy their traditional rights to discipline students for academic deficiencies and academic misconduct, the legal context in which these powers are exercised has been. transformed. Courts have greatly expanded the procedural protections afforded to students of higher education.[2] As a result, colleges and universities have witnessed an explosion of lawsuits challenging the validity of their disciplinary procedures and alleging violations of due process rights.

Creating proper disciplinary rules and procedures has become an essential element of administrative risk management. Efforts to create sound policies and procedures involve considering the following questions:

- What procedural rights must be afforded to college students facing disciplinary sanctions for academic deficiencies or academic misconduct?
- Are there different standards for public and private institutions?

### *The Emergence of Students' Rights*

Judicial intervention in university disciplinary proceedings has occurred only recently. This development originated in *Dixon v. Alabama State Board of Education* (1961),[3] when the Fifth Circuit reversed a lower court ruling that allowed students to be expelled for participating in a civil rights demonstration. This landmark decision departed from the tradition of judicial deference to academic decision-making because it held that due process requires that a student at a tax-supported college be given notice and some opportunity for a hearing before he or she is expelled for misconduct.[4]

The United States Supreme Court endorsed this same principle a decade later.[5] Although the Supreme Court has held that students facing suspension or expulsion must be given "*some* kind of notice and afforded *some* kind of hearing," it has not created a general rule specifying what formal procedures are required.[6]

### *Dismissal for Academic Deficiencies*

Courts have recognized the right of colleges and universities to establish their own academic standards.[7] Students can be dismissed without a formal hearing when their academic or clinical performance fails to meet these standards.[8] Courts have generally upheld the dismissal or suspension of students at public universities for academic deficiencies when:

- The student was fully informed of the college or university's dissatisfaction with his or her academic or clinical progress and the resulting threat that these deficiencies posed to graduation or continued enrollment.[9]
- The application of the policy was not arbitrary or capricious.[10]

Private institutions are not subject to federal constitutional constraints and are allowed even more latitude in promulgating academic disciplinary rules. Nevertheless, private institutions should a&ere to much the same guidelines as their public counterparts in order to minimize the chances of being held liable on the grounds that their policies are enforced arbitrarily.[11]

### *Dismissal for Academic Misconduct*

In discussing the appropriate safeguards that colleges should provide to accused students, courts have usually distinguished cases involving discipline for academic reasons and those for misconduct.[12] However, an ambiguous area of "academic misconduct" combines elements of both categories.[13] Academic misconduct refers to violations of university policies that are aimed at preserving the integrity of the learning process. The most common offenses include cheating, plagiarism, and other serious honor code violations.

Courts have imposed more stringent procedural requirements on public institutions seeking to discipline students in cases involving academic misconduct rather than academic deficiencies.[14] Courts have held private institutions to similar standards in requiring them to demonstrate that their disciplinary procedures are fair to accused students.[15]

While students accused of academic misconduct are entitled to some due process protections, their rights are not co-extensive with either the rights of litigants in civil cases or those of defendants in criminal trials.[16] Courts have generally required that colleges and universities provide the following procedural safeguards to students facing dismissal for academic misconduct:

- A fair hearing at which the student is permitted to present evidence before an impartial arbiter.[17]
- Notice of the nature of pending charges.[18]
- Adequate time to prepare a response to the charges at a disciplinary hearing.[19]

At the same time, courts have generally refused to require colleges and universities to provide the following procedural safeguards to students facing dismissal for academic misconduct:

- Advance notice of statements of accusing witnesses.[20]
- The right to directly cross-examine accusing witnesses.[21]
- The right to bring a representative to the hearing.[22]
- The right to a transcript of the proceedings.[23]
- A detailed statement by the reviewing authority explaining its decision.[24]

If minimal procedural rights are afforded, both federal and state courts are likely to uphold the decisions of college and university officials to dismiss students for academic misconduct.[25] Student complaints are only likely to prevail if the students can demonstrate that they were treated arbitrarily or capriciously.[26]

While colleges and universities are not always required to follow the letter of their own established procedures for dealing with academic misconduct,[27] an institution is in a much stronger legal position if it both enacts clear policies and follows them. Both public and private institutions should take appropriate steps to ensure that their students are properly notified of these policies.[28]

### *Compliance Strategies*

The above requirements provide a useful starting point for college and university administrators to draft policies for the dismissal of students for academic deficiencies or academic misconduct. The advice of counsel, experienced in higher education matters, should be sought before final policies and procedures are implemented.

Both public and private postsecondary institutions should devise clear and concise student disciplinary policies. The protection afforded to the accused should be tailored to the nature of the alleged offense. Different levels of protection may be required, depending on whether a student is being disciplined for purely academic reasons, academic misconduct, or some other disciplinary infraction. Students should be properly notified of the standards to which they will be expected to conform.

## END NOTES

1. The first in a two-part series: Part I considers the application of due process principles in cases of academic deficiencies or academic misconduct, while Part II concentrates on non-academic misconduct. The second part will be published in the Fall issue of *HELB*.

2. *See* notes 3-6, *infra*.

3. 294 F.2d 150.

4. *Id.* at 157.

5. *Goss v. Lopez* (1975) 419 U.S. 565. The case concerned the 10-day suspension of high school students but its general holding is applicable to higher education.

6. *Id.* at 579.

7. *Board of Curators of the University of Missouri v. Horowitz* (1978) 435 U.S. 78, 86; *Regents of the University of Michigan v. Ewing* (1985) 474 U.S. 214, 225-226.

8. *Horowitz, supra*, at 89-90.

9. *Schuler v. University of Minnesota* (8th Cir. 1986) 788 F.2d 510, 514; Harris v. Blake (10th Cir. 1986) 798 F. 2d 419, 423-424; *Haberele v. University of Alabama in Birmingham* (11th Cir. 1986) 803 F.2d 1536, 1539; *Mauriello v. University of Med. & Dentistry of New Jersey* (3rd Cir. 1986) 781 F.2d 46, 50.

10. *Horowitz, supra*, at 91-92; *Ewing, supra*, at 227-228.

11. *See Slaughter v. Brigham Young University* (10th Cir. 1975) 514 F.2d 622, 625-627; William A. Kaplin, *The Law of Higher Education* (San Francisco: Jossey-Bass Publishers, 1985) at 294.

12. *Horowitz, supra*, at 86; *Ewing, supra*, at 225-226.

13. *See* Karla H. Fox, *Due Process and Student Academic Misconduct* (1985) Amer. Bus. Jnl. of Law 671, 672-673.

14. *Jaska v. Regents of University of Michigan* (E.D. Mich. 1984) 597 F.Supp. 1245; Nash v. Auburn University (11th Cir. 1987) 812 F.2d 655; *Henson v. Honor Committee of University of Virginia* (4th Cir. 1983) 719 F.2d 69.

15. *Clayton v. Trustees of Princeton University* (D.C. N.J. 1985) 608 F.Supp. 413.

16. *Goss supra*, at 579; *Nash, supra*, at 664; *Anderson v. Regents of the University of California* (1972) 22 Cal.App.3d 763, 770.

17. *Nash, supra*, at 660-661; *Clayton, supra*, at 439; *Jaska, supra*, at 1250-51.

18. *Nash, supra*, at 661-663; *Jaska, supra*, at 1250.

19. *Id.*

20. *Nash, supra*, at 666-667; *Clayton, supra*, at 432-433.

21. *Nash, supra*, at 662-663; *Jaska, supra*, at 1250.

22. *Nash, supra*, at 664; *Jaska, supra*, at 1252, 1253.

23. *Clayton, supra*, at 419, 422-425; *Jaska, supra*, at 1251-1252.

24. *Id.*

25. *Clayton, supra*, at 435-436; *Jaska, supra*, at 1254; *Wong v. Regents of the University of California* (1971) 15 Cal.App.3d 823, 829; *Shuffer v. Board of Trustees* (1977) 67 Cal.App. 208, 219-20.

26. *See, Connelly v. University of Vermont and State Agr. Col.* (1965) F.Supp. 156, 160-61; *Paulsen v. Golden Gate University* (1979) 25 Cal.3d 803, 809; *Widemonn v. State Univ. Of New York College at Cortland* (A.D. 1992) 592 N.Y.S.2d 99.

27. *See, Jaska, supra*, at 809 (public institutions); *Clayton, supra*, at 419; *Paulsen, supra*, at 809 (private institutions).

28. *Clayton, supra*, at 421-22. One of the most effective means of providing such notice to students is by publishing disciplinary policy in the school catalog (see *HELB* 3:1).

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# Protecting Student Disciplinary Codes from Due Process Challenges[1]

## Part II

by
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Over the last thirty years, colleges and universities have dramatically expanded the scope of their student disciplinary codes. No longer confined to scholastic deficiencies and academic misconduct, the disciplinary process now seeks to regulate almost every aspect of student behavior. In some instances, university disciplinary codes concern behavior that is also subject to criminal sanctions. At the same time, courts have greatly expanded the procedural protections afforded to students of higher education. As a result of these trends, educational institutions have witnessed an explosion of lawsuits challenging the validity of their disciplinary rules and alleging violations of due process rights.

Creating proper disciplinary rules and procedures has become an essential element of administrative risk management. Efforts to create sound policies and procedures involve the following questions:

- What standards are employed for testing the validity of student disciplinary policies?
- Are there different standards for public and private institutions?
- What procedural rights must be afforded to college students facing disciplinary sanctions for non-academic misconduct?

### *The Emergence of Students' Rights*

Judicial intervention in disciplinary proceedings has occurred only recently. This development originated in *Dixon v. Alabama State Board of Education,*[2] when the Fifth Circuit reversed a lower court ruling allowing the expulsion of students for participating in a civil rights demonstration. This landmark decision departed from the tradition of judicial deference to academic decision-making by holding that due process requires notice and some opportunity for a hearing before a student at a tax-supported college can be expelled for misconduct.

The United States Supreme Court endorsed this same principle a decade later.[3] Although the Supreme Court has held that students facing suspension or expulsion must be given "*some* kind of notice and afforded *some* kind of hearing," it has not created a general rule specifying what formal procedures are required.[4]

### *Creating Disciplinary Codes*

Both public and private postsecondary institutions have traditionally created rules for behavior which students are expected to follow. Courts have generally respected the authority of these institutions to regulate the conduct of their students, subject to certain limitations.

In cases involving public institutions, courts have sometimes refused to uphold the dismissal of students whose conduct was punished under general "misconduct" standards.[5] Other courts have upheld such disciplinary actions by emphasizing both the need for "flexibility. . . rather than meticulous specificity" in college regulations and the institution's "latitude and discretion in the formulation of rules and regulations."[6] Generally, however, courts have required colleges to express their standards for student behavior in "reasonably clear and narrow rules."[7] While general standards of behavior may provide administrators with useful flexibility, courts are more likely to uphold a narrower system of rules that enumerates specific offenses.

In promulgating disciplinary rules, private institutions have more latitude than their public counterparts. Courts are likely to recognize a broad contractual right to discipline that is implied in the student-institution relationship.)[8] Under this expansive view, disciplinary rules that private institutions create will not be held to the same specificity standards as the disciplinary rules of public schools.

Despite the more generous approach that courts have taken with respect to private institutions, neither public nor private school administrators should assume that they have "unfettered discretion" in creating disciplinary rules.[9] Courts cannot be expected to protect either public or private institutions that engage in arbitrary disciplinary actions. At the same time, courts may overturn the actions of private school administrators when they are clearly contrary to the school's own established rules.[10] Courts may also intervene in private school disciplinary cases when there are no clearly applicable rules and the student could not reasonably be expected to know that his or her conduct was wrong.[11]

### *Due Process Requirements*

Courts have reserved the most generous due process protections for students facing sanctions for non-academic misconduct.[12] Students disciplined for misconduct are afforded far more rights than those disciplined for academic reasons. Courts have not hesitated to impose specific procedural due process restrictions on institutions seeking to discipline students for non-academic misconduct.

The specific procedures required by some courts are detailed below. While these provisions apply to public institutions, private colleges and universities should use them as guidelines for drafting their own policies. The adoption of these rules would enhance a private school's ability to defend against charges of arbitrariness.

*1.* ***Notice***. Notice should be given both of the conduct that the student is accused of and the specific rule he or she is said to have violated. While the charges do not need to be enumerated with the specificity of a criminal indictment, the student should have the charges drawn "in sufficient detail [to enable him] to present a defense" at a hearing.[13] Courts have not insisted that the student be presented with advance notice of the statements of the accusing witnesses.[14]

There is no clear constitutional requirement regarding the amount of advance notice that a student must be given of the pending charges. As little as two days has been upheld by courts.[15] Courts usually answer the question on a case-by-case basis, considering whether the amount of time was fair under the circumstances.

*2.* ***Hearing***. The minimum requirement is that the student be provided with an opportunity to speak in his or her own defense.[16] Due process does not require an open or public hearing and institutions may close these proceedings at their discretion.[17] Courts usually allow students to hear the evidence against them and to present oral testimony or written statements in their defense.[18] Formal rules of evidence need not be followed.[19] While courts have not required the right to cross-examination, a transcript, or an appellate procedure, they have sometimes stated that these procedures enhance the hearing's fairness.[20]

### *Criminal Conduct*

Colleges and universities may be required to provide additional due process protections to students accused of misconduct that may be the subject of criminal proceedings. Neither public nor private institutions are required to stay their disciplinary proceedings until the criminal charges against the student are resolved.[21] Courts have held that compelling students to testify in university disciplinary hearings before the conclusion of criminal proceedings does not violate the privilege against self-incrimination.[22]

While courts have generally held that a student does not have a right to counsel at university disciplinary hearings, several courts have upheld the right to counsel in cases alleging criminal conduct.[23] When counsel is allowed in disciplinary hearings, it is usually in an advisory capacity. No court has urged the right of the accused student to have an attorney directly cross-examine accusing witnesses at a disciplinary hearing. Even in the absence of a specific mandate, it may be prudent for colleges to allow accused students to bring advisory counsel to disciplinary hearings. This action will enhance an institution's claim that it provided fair procedures to students before imposing discipline.

### *Compliance Strategies*

Both public and private postsecondary institutions should create clear and concise student disciplinary policies. Students should be properly notified of the standards to which they will be expected to conform. Student participation in drafting disciplinary policies is often valuable and informative. The advice of counsel, experienced in higher education matters, should be consulted before promulgating disciplinary rules and establishing disciplinary review procedures.

Once disciplinary rules and procedures are established, both public and private institutions should make certain that their administrative officials follow the policies. Any significant deviation from established procedures should be undertaken only upon the advice of counsel. These suggestions should assist colleges and universities in preventing and defending lawsuits that arise out of student discipline problems.

## RECENT CASE HIGHLIGHTS

**Unemployment Compensation.** An appellate court in California has upheld a decision of the California Unemployment Insurance Appeals Board finding student work exempt even when the work was not related to the student's course of study. California's Unemployment Insurance Code exempts services performed by students regularly attending classes. However, a related regulation states that if the student's course of study is "incidental"to the work performed, then the exemption does not apply. In *Davenport v. Cal. Unemployment Ins. Appeals Bd.* (1994) 24 Cal.App.4th 1695, a student who was enrolled in the cinema department at the University of Southern California, but whose job was in the business school, claimed that the exemption did not apply because his work had no relation to his course of study. The University prevailed, arguing that the job had been provided to assist the student financially to enable him to attend school, and that the services should therefore be exempt.

**Due Process.** A Texas appellate court has upheld a trial court decision ordering the University of Texas Medical School at Houston to grant a diploma to a medical student it attempted to expel for cheating. In University of *Texas Medical School v. Than* (1994) 874 S.W.2d 839, the court first reiterated that students being dismissed from state-supported schools are entitled to due process. Second, the court determined that the student's dismissal for cheating was disciplinary in nature, not academic, therefore entitling the student to greater due process protections, including notice of the charges, notice of the evidence to be used against the student, and a hearing.

**Sex Discrimination.** In a case brought under the City of New York's Human Rights code, a New York appellate court has found that withdrawal of employment made in the context of settlement negotiations can be viewed as discriminatory retaliation. An adjunct lecturer, Bette Mittleman, had filed a claim of discrimination against Pace University when it denied her tenure. Subsequently, the University employed Ms. Mittleman as an adjunct and, after settlement discussions broke down, refused further employment unless she withdrew her sex discrimination complaint. An administrative law judge found that the University had not, in fact, discriminated against her but did find that the University had retaliated against her for her filing of the complaint. The appellate court affirmed this finding in *Pace University v. Com'n. on Human Rights* (1994) 611 N.Y.S.2d 835.

**Contracts**. A Missouri court has found that the Vice President of the Medical Center at St. Louis University had apparent authority to enter into a severance agreement with the hospital's former chief financial officer. The agreement was negotiated and signed by the former chief financial officer and the Vice President, apparently without review by the University's President. When the President learned of the terms of the agreement, he stated that he could not agree to it. The chief financial officer then sued to enforce the contract and prevailed at both the trial and appellate levels. The case, *Earl v. St. Louis Univ.* (Mo.Ct.App. E.D. 1994) 875 S.W.2d 234, illustrates the importance of implementing a contract administration policy.

## KEY CASE ANALYSIS

### UNIVERSITY EMPLOYEE ACCUSED OF SEXUAL HARASSMENT REINSTATED FOR DENIAL OF DUE PROCESS

The recent decision of *Starishevsky v. Hofstra Univ.* (1994) 612 N.Y.S.2d 794 illustrates that colleges have potential liability not only to the victims of sexual harassment, but also to the employee who is accused of the harassment. In this case, Dr. Starishevsky, a psychologist, was employed as Director of the Counseling Center at Hofstra University. He was accused of sexual harassment by a student who alleged that Dr. Starishevsky had kissed her on the lips at the end of a counseling session. The Affirmative Action Officer closed the case finding that there was insufficient evidence to establish sexual harassment.

As a result of media coverage, two additional students came forward with allegations that Dr. Starishevsky engaged in similar misconduct four years earlier. Based upon the new allegations, the college reopened its investigation and an inquiry panel conducted a hearing and concluded that Dr. Starishevsky probably did kiss the student, but that one kiss did not constitute sexual harassment. However, the inquiry panel concluded that Dr. Starishevsky's conduct was unethical, unprofessional, and inappropriate and recommended that Dr. Starishevsky's employment be reexamined even though the single incident did not by itself justify termination. The President agreed that Dr. Starishevsky was not guilty of sexual harassment, but terminated his employment based upon unethical conduct and because Dr. Starishevsky did not have the confidence of the college.

Dr. Starishevsky filed a lawsuit seeking reinstatement. The court ruled that the college was obligated to adopt and publish a grievance procedure under Title IX of the Education Amendments of 1972 (*see* C.F.R. § 106.8[b]; 20 U.S.C. §§ 1681 *et seq.)* providing for prompt and equitable resolution of sexual harassment claims and ensuring fairness to both the accuser and the accused. The court reinstated Dr. Starishevsky's employment finding that the college violated due process and failed to follow its own procedures. The violations include:

- Broadening the scope of the charges beyond the single alleged incident of sexual harassment in direct contravention of the college's policy and failing to advise Dr. Starishevsky so that he could properly prepare a defense.

- Widely disseminating a memorandum discussing the charges in violation of its own policy, which promised confidentiality.

- Permitting the inquiry panel to interview witnesses without the accused's knowledge, thereby depriving him of his right to cross-examination.

- Terminating Dr. Starishevsky based upon conduct other than the alleged incident after specifically finding that he was not guilty of sexual harassment.

What lessons can be learned from the *Hofstra University* case? First, colleges should adopt and disseminate clear policies and procedures regarding the investigation of sexual harassment claims.

Second, colleges must strictly adhere to their own published procedures when they investigate claims. Many claims are the result of the college's failure to follow its own procedures.

Third, when investigating claims, colleges should be as vigilant in protecting the rights of the accused as the rights of the accuser.

## END NOTES

1. This is the second article in a two-part series. Part I (*HELB* 3:2) considered the application of due process principles in cases of academic deficiencies or academic misconduct, while part II concentrates on non-academic misconduct.

2. (1961) 294 F.2d 150.

3. *Goss v. Lopez* (1975) 419 U.S. 565. The case concerned the 10-day suspension of high school students but its general holding is applicable to higher education.

4. *Id* at 579; *Board of Curators of University of Missouri v. Horowitz* (1978) 435 U.S. 78, 86.

5. *Soglin v. Kauffman* (1969) 418 F.2d 163, 167-168; see also William S. Kaplin, *The Law of Higher Education* (San Francisco: Jossey-Bass Publishers, 1985) at 292-293.

6. *Jenkins v. Louisiana State Bd. of Education* (5th Cir. 1975) 506 F.2d 992, 1004.

7. *Soglin, supra,* at 167; see also Kaplin, *supra*, at 293.

8. *Grossner v. Trustees of Columbia University* (S.D.N.Y.) 1968) 287 F.Supp. 535, 551-552.

9. Kaplin, *Supra*, at 1004.

10. *Holert v. University of Chicago* (N.D. Ill, 1990) 751 F. Supp. 1291, 1300-1301; *Slaughter v. Brigham Young University* (10th Cir. 1975) 514 F.2d 622, 626.

11. *Jenkins, supra.* at 1004.

12. Less stringent due process protections are afforded to students facing discipline for academic deficiencies or academic misconduct. For a discussion of these questions, see the first part of this article in *HELB* 3:2.

13. *Jenkins, supra*, at 1000.

14. *Id.*

15. *Nash v. Auburn University* (11th Cir. 1987) 812 F.2d 655, 662, 663.

16. *Jenkins, supra,* at 1000.

17. *Horowitz, supra*, at 89; *Kaplin, supra*, at 305.

18. *Jenkins, supra*, at 1000.

19. *Henson v. Honor Committee of Univ. of Virginia* (4th Cir. 1983) 719 F.2d 69, 73; Jay M. Zitter, "*Admissibility of Hearsay Evidence in Student Disciplinary Hearings*," 30 ALR 4th 935, 936-937.

20. *Henson, supra*, at 73-74.

21. *Grossner, supra*, at 551.

22. *Furutani v. Ewigleben* (N.D. Cal. 1969) 297 F.Supp. 1163, 1164.

23. *Gabrilowitz v. Newman* (1st Cir. 1978) 582 F.2d 100, 106-107.

## COMMENTARY

# LITIGATION INVOLVING HIGHER EDUCATION EMPLOYEE AND STUDENT HANDBOOKS*

by

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* *The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 109 Ed.Law Rep. [1031] (July 25, 1996).*

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Handbooks are prepared by public and private educational institutions to provide information to employees and students about the organization. Often as part of a broader package of organizational literature, such as brochures and catalogs,[1] handbooks can make promises or commitments to employees or students,[2] but can also establish standards that the organization expects employees and students to meet.[3]

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[1] *See, e.g., Andre v. Pace Univ.*, 161 Misc.2d 613, 618 N.Y.S.2d 975 [96 Ed.Law Rep. [192]] (City Ct. 1994) (failure of university faculty member to teach computer course at elementary level as advertised in catalog entitled students to tuition refund for breach of contract and punitive damages under state deceptive practices act); *Idrees v. American University of the Caribbean*, 546 F.Supp. 1342 [6 Ed.Law Rep. [653]] (S.D.N.Y.1982) (inaccurate and misleading statements in university brochure about facilities, equipment and faculty constituted fraudulent misrepresentation); *Dezick v. Umpqua Community College*, 287 Or. 303, 599 P.2d 444 (1979) (failure of college to offer advanced welding program as advertised in catalog resulted in damages award to student).

[2] Promises that entice faculty or students to attend or to stay at an educational institution can be contractual in nature when conveyed in institutional documents. *See, e.g., CENCOR, Inc. v. Tolman*, 868 P.2d 396 [89 Ed.Law Rep. [627]] (Colo.1994) (students who alleged that vocational school failed to deliver educational services, including instruction on certain equipment, had breach of contract claim); *Ross v. Creighton Univ.*, 957 F.2d 410 [73 Ed.Law Rep. [352]] (7th Cir.1992) (failure to deliver meaningful participation in academic programs, such as tutoring, as promised to recruited basketball player, who, after 4 years was far short of credits for graduation, stated breach of contract claim).

[3] *See, e.g., Seare v. University of Utah School of Medicine*, 882 P.2d 673 [94 Ed.Law Rep. [998]] (Utah Ct.App.1994) (contract with fifth year surgery resident expecting to enter two additional years of plastic surgery residency was different in content from

In short, handbooks can create mutual sets of expectations. Handbooks are a kind of road map identifying significant informational mileposts and explaining how the institution operates. Both public and private educational institutions use handbooks, and despite a constitutional overlay for public institutions,[4] the interpretive problems for both kinds of organizations are remarkably similar.[5]

Litigation involving handbooks occurs in educational institutions when new fact situations arise that are not addressed in the handbook,[6] when expectations for employees and students are not well-defined and/or are subject to differing interpretations,[7] or when procedures identified for addressing expectations have not

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regular five year surgery resident rotations, and therefore, refusal of Director of General Surgery to certify plaintiff at end of five years to sit for general surgery board exam not a breach of contract where defendant had in good faith assessed that plaintiff lacked the necessary training to be certified as competent to sit for the exam).

[4] *Cf. Alcorn v. Vaksman*, 877 S.W.2d 390 [91 Ed.Law Rep. [1201]] (Tex.Ct. App. 1994) (student dismissed from public university doctoral program entitled to damages and reinstatement where the student had a property interest in continued enrollment but had not received notice of charges against him, notice of the evidence of evidence against him and a hearing) with *Galiani v. Hofstra Univ.*, 118 A.D.2d 572, 499 N.Y.S.2d 182 [30 Ed.Law Rep. [1247]] (1986) (only due process to which student entitled prior to suspension was conformity of university to its own disciplinary procedures in its handbook).

[5] *See generally*, Mawdsley, *Comparison of Employment Issues in Public and Private Higher Education Institutions*, 65 Educ.L.Rep. 669 (1991).

[6] *See, e.g., Newmam v. Burgin*, 930 F.2d 955 [67 Ed.Law Rep. [113]] (1st Cir.1991) (tenured faculty member disciplined for plagiarism under faculty handbook that provided only for discipline for "major personnel problems" and contained no specific prohibition of plagiarism for faculty nor procedures for dealing with a plagiarism charge).

[7] *See, e.g., Raines v. Haverford College*, 849 F.Supp. 1009 (E.D.Pa.1994) (language in employment handbook regarding termination for cause and a four-step process for dealing with discipline did not alter state presumption of employment-at-will); *Gilbert v. Tulane Univ.*, 909 F.2d 124 [62 Ed.Law Rep. [61]] (5th Cir.1990) (ambiguity in handbook as to whether grievance procedure applied to high-level management employees made the handbook merely informational and did not change at-will employment status); *Hill v. Talledaga College*, 502 So.2d 735, 739 [37 Ed.Law Rep. [999]] (Ala.1987) (part of AAUP guidelines incorporated into faculty handbook that "probationary period should not exceed seven years" did not confer tenure on plaintiff who had taught at College for ten years).

been followed.[8] Any time an educational institution threatens to change an employee's or student's relationship to that institution, litigation may result.

However, the success of litigation will depend on the appropriateness of the legal theory underlying the complaint. Basic to the success of any legal theory involving handbooks are answers to some fundamental questions: whether a handbook indicates a contractual relationship between the employee or student and the institution;[9] if a handbook indicates a contractual relationship, whether that part of the contract can be altered during the employee's or student's tenure at the institution;[10] and how the handbook should be interpreted in the event of ambiguity or inconsistencies.[11]

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[8] *See, e.g., Fellheimer v. Middlebury College*, 869 F.Supp. 238 (D.Vt.1994) (private college ordered to reinstate or grant new hearing to student found guilty of disrespect to persons, after having been found not guilty of rape, where student had been provided notice of charge of rape, but not the charge of disrespect to persons; disrespect of persons was the general charge from the student handbook, and even though the language could include rape, the college was required to provide notice of both the specific and general charges); *Kalinsky v. State Univ. of New York*, 161 A.D.2d 1006, 557 N.Y.S.2d 577 [61 Ed.Law Rep. [695]] (1990) (student denied one semester enrollment after having been found guilty of plagiarism entitled to new hearing where neither hearing committee nor dean would reveal evidence on which they had based their decisions, a requirement in the student handbook).

[9] *See, e.g., Arneson v. Board of Trustees, McKendree College*, 210 Ill.App.3d 844, 155 Ill.Dec. 252, 569 N.E.2d 252 [66 Ed.Law Rep. [1188]] (1991) (faculty manual containing nonrenewal notice for nontenured faculty was incorporated into faculty contracts, even though college had refused to adopt the manual); *Pundt v. Millikin Univ.*, 145 Ill.App.3d 990, 99 Ill.Dec. 716 [34 Ed.Law Rep. [212]] 496 N.W.2d 291 (1986) (by providing staff handbook and stating that permanent employees would be discharged for good cause only, employee had a right and expectation that the policy manual would be followed); *University of Tex. Health Science Center at Houston v. Babb*, 646 S.W.2d 502 [9 Ed.Law Rep. [1099]] (Ct.App.1982) (catalog requirement that nursing student had six years with minimum 2.0 GPA to complete program was a contract and a later revision permitting dismissal for two D's did not apply).

[10] *See, e.g., Love v. Duke Univ.*, 776 F.Supp. 1070 [71 Ed.Law Rep. [124]] (M.D.N.C.1991) (Ph.D. student dismissed for course failures and later readmitted subject to reduced number of semesters to pass preliminary examination because the university's bulletin not viewed as binding contract); *Marquez v. University of Wash.*, 32 Wash.App. 302, 648 P.2d 94 [5 Ed.Law Rep. [617]] (Wash.Ct.App.1982) (law school student handbook providing for special tutoring programs for minorities could be changed from a formal to an informal program without breaching contract with student).

[11] *See, e.g., Basch v. George Washington Univ.*, 370 A.2d 1364 (D.C.Ct.App.1977) (university bulletin estimating medical school tuition increases at $200 per year for the

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This article will review judicial responses to these three fundamental questions. Because the focus of the article is the litigation process, attention will be paid more to the similarities among the case law, rather than the differences that exist between student and employee (especially, faculty) decisions on one hand, and public and private educational institutions on the other. The first part of the article will consider the litigation issues relevant to the contractual relationship. The second part will examine legal problems pertaining to changing the handbook. And the third part will consider different approaches to interpreting ambiguity and inconsistency in handbook language.

## THE HANDBOOK AS CONTRACT

Case law is replete with references to the relationship between employees/students and educational institutions as contractual in nature.[12] The contract argument is much easier to make for employees, such as faculty, because of the obvious exchange of teaching services for compensation as formalized in a written document. Nonetheless, even though students generally do not execute formal contracts with universities, the same basic exchange of teaching services by the institution for student tuition takes place and suggests a contract. Thus, legal actions by students against higher education institutions will generally be grounded in contract. Efforts by students to fashion a remedy grounded in another theory, such as the law of associations, have not met with favorable judicial response.[13]

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next four years contained words, "estimated," "projected," and "approximate" which a reasonable person could interpret as permitting tuition increases of $1800 to $7500); *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 624, 627 (10th Cir.1975) (student handbook provision requiring "high principles of honor, integrity and morality" could be basis for expelling student for publishing article using faculty member's name without his consent because contract between a university and a student cannot be interpreted with "the blanket application of commercial contract doctrines").

[12] *See, e.g., Gray v. Loyola University of Chicago*, 274 Ill.App.3d 259, 210 Ill.Dec. 330, 652 N.E.2d 1306, 1309 [102 Ed.Law Rep. [271]] (1995) ("The faculty manual was an essential part of the relationship between Mundelein and its tenured faculty.... Tenure rights are contractual in nature, and a faculty manual setting out the terms and conditions of tenure is a contract."); *Peretti v. State of Mont.*, 464 F.Supp. 784, 786 (D.Mont.1979) ("This contract is conceived as one by which the student agrees to pay all required fees, maintain the prescribed level of academic achievement, and observe the school's disciplinary regulations, and in return for which the school agrees to allow the student to pursue his course of studies and be granted a diploma upon the successful completion thereof").

[13] The advantage of the theory of law associations is that it provides "protection of the members valuable personal relationship to the association and the status conferred by that relationship.... The loss of status resulting from the destruction of one's relationship to a professional organization at times may be more harmful than a loss

However, for purposes of this article, the issue is not whether the relationship between a university and employees/students is one of contract, but whether an employee or student handbook is part of that contract. Intuitively, one would expect handbooks to be part of every contractual relationship simply because they contain institutional information, policies and procedures. But, like any contract, the terms of the contract depend on the intent of the parties. In *Wall v. Tulane University*,[14] a university tuition waiver policy could be changed because "Tulane's Staff Handbook, which described the benefits and conditions of employment with Tulane, was not made part of [plaintiff's] employment agreement with Tulane."[15] Even though plaintiff alleged that he turned down more lucrative offers to attend Tulane because of its tuition waiver policy, the court, in sustaining a summary judgment for the university, opined that the "Handbook appear[ed] to be primarily informational in nature and did not, in our opinion, constitute a binding promise by Tulane to continue indefinitely the benefits described therein".[16]

Whether employee handbooks are part of employee contracts will vary among states. Some states include handbooks as part of employment contracts.[17] Other states require that a handbook be expressly included by reference into a contract before terms in the handbook are enforceable.[18] On the other hand, other states require inclusion of

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of property or contractual rights." *Napolitano v. Princeton Univ.*, 186 N.J.Super. 548, 453 A.2d 263, 271 [8 Ed.Law Rep. [74]] (N.J.Super.Ct.App.Div. (1982), *affirming* 186 N.J.Super. 576, 453 A.2d 279 [8 Ed.Law Rep. [74]] (N.J.Super.Ct.Ch.Div.1982). In rejecting the law of associations as a theory to support a student's claim, following her discipline for plagiarism, the court in *Napolitano* opined that the law does not "delineate completely the relationship between a student and a university." Id. at 272. The law of associations is a more appropriate theory in membership organizations. For a case where the theory was applied, *see Higgins v. American Soc'y of Clinical Pathologists*, 51 N.J. 191, 238 A. 665 (1968). *See also, Christ the King Regional High School v. Catholic High Schools Athletic Ass'n, Diocese of Brooklyn*, 164 Misc.2d 310, 624 N.Y.S.2d 755 [99 Ed.Law Rep. [1055]] (Sup.Ct.1995) (based on association theory, association had improperly excluded high school from league play).

[14] 499 So.2d 375 [36 Ed.Law Rep. [1041]] (La.Ct.App.1986).

[15] *Id.* at 376.

[16] *Id.*

[17] *E.g., see Horn v. State*, 459 N.W.2d 823 [62 Ed.Law Rep. [710]] (N.D.1990) (regulations adopted by the State Board of Higher Education were part of employment contract between faculty member and university).

[18] *E.g., see, Black v. Western Carolina Univ.*, 109 N.C.App. 209, 426 S.E.2d 733 [80 Ed.Law Rep. [1092]] (N.C.App.1993) (tenure policies and notice requirements of AAUP were not part of professor's employment contract, where those policies and notice requirements were not expressly incorporated into the professor's contract).

handbook terms into an employment contract, even without express reference, where university practice treated the terms as applicable to employees.[19] Still other states require that handbooks meet contract requirements of offer, acceptance, and consideration before they are enforceable.[20]

In states where contracts of indefinite duration are presumed to create an employment-at-will relationship, language in handbooks will not alter that relationship unless the language constitutes an offer. In *Raines v. Haverford College*,[21] a discharged carpenter foreman was considered to be an employee-at-will under Pennsylvania law and, therefore, could not claim a contractual right to language in the employee handbook providing for termination for cause and a four-step disciplinary process because "there [was] no indication that [the College] made any just cause policy as part of a definite offer of employment...."[22] Similarly, in *Shannon v. Bepko*,[23] an hourly evening supervisor who had been discharged was not entitled to invoke handbook language that "employees may only be discharged for just cause."[24] Under Indiana law, an employment relationship of indefinite duration makes a person an employee-at-will and, "in the absence of a binding promise on the part of the employee that he would continue in the employer's employment for a fixed duration, an employee handbook is inadequate under Indiana law to create either an express or an implied contract."[25] Similarly, in Texas, a handbook does not alter an employment-at-will status only by specifically and expressly limiting the employment relationship.[26] On the other hand, a former at-will employee of Columbia University stated a triable cause of action that the Personnel Policy Manual limited the university's right to terminate by requiring that officers of administration could not be terminated except for cause.[27]

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[19] *E.g., see DeSimone v. Skidmore College*, 159 A.D.2d 926 553 N.Y.S.2d 240 [59 Ed.Law Rep. [855]] (App.Div.1990) (oral promise to nontenured faculty member to be appointed to second three-year term as provided in faculty handbook changed at-will employment even though handbook not expressly included in contract); *Robinson v. Board of Trustees of East Cent. Jr. College*, 477 So.2d 1352 [28 Ed.Law Rep. [944]] (Miss.1985) (handbook included within faculty contract even though board of trustees had never adopted handbook because it had been used and disseminated within the university); *Hillis v. Meister*, 82 N.M. 474, 483 P.2d 1314 (1971) (even though faculty member's contract made no reference to handbook, it was applicable because of university course of conduct).

[20] *E.g., see Goodkind v. University of Minnesota*, 417 N.W.2d 636 [44 Ed.Law Rep. [650]] (Minn.1988) (appointment of faculty member as chairperson insufficiently related to terms and conditions of tenured faculty member's employment to form basis for unilateral contract); *Fogel v. Trustees of Iowa College*, 446 N.W.2d 451 [56 Ed.Law Rep. [590]] (Iowa 1989) (handbook placing no limit on dismissal for cause and no definition of misconduct provided no enforceable unilateral contract for discharged at-will food service employee).

[21] 849 F.Supp. 1009 [91 Ed.Law Rep. [133]] (E.D.Pa.1994).

[22] *Id.* at 1013.

[23] 684 F.Supp. 1465 [47 Ed.Law Rep. [150]] (S.D.Ind.1988).

[24] *Id.* at 1477.

In some states, however, handbook provisions can be enforceable for employees-at-will on a unilateral contract theory where a policy is sufficiently definite in form and is communicated to the employee. Under this approach, the handbook provision becomes an offer and the employee's retention of employment after receiving the handbook constitutes acceptance of and consideration for the offer.[28]

Thus, an employment handbook can form part of the contract for an employee-at-will contract on a unilateral contract theory only if the handbook is sufficiently definite in its terms to create an *offer*; the handbook has been communicated to and accepted by the employee so as to create acceptance; and the employee has continued working so as to provide consideration.[29]

Similarly, handbook provisions may create an implied-in-fact contract, in essence transferring handbook rights to an employee and changing the nature of the at-will contract.[30] However, even handbook provisions will not protect an employee where the provisions are not applicable to the action taken by the employer.[31]

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[25] *Id.* at 1479.

[26] *See Whitehead v. University of Tex.*, 854 S.W.2d 175 [83 Ed.Law Rep. [865]] (Tex.Ct.App.1993) (handbook provision identifying 5 conditions for disciplinary action and discharge were guidelines only and did not modify employment-at-will).

[27] *Aharanwa v. Trustees of Columbia Univ.*, 163 A.D.2d 8, 557 N.Y.S.2d 76 [61 Ed.Law Rep. [243]] (App.Div.1990).

[28] *See Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn.1982) (four-step disciplinary process in employee handbook became part of employees' contract with employer and failure to follow these job termination procedures constituted breach of contract).

[29] *Fogel v. Trustees of Iowa College*, 446 N.W.2d 451, 456 [56 Ed.Law Rep. [590]] (Iowa 1989) (emphasis in original).

[30] *See Wood v. Loyola Marymount Univ.*, 218 Cal.App.3d 661, 267 Ca.Rptr. 230 [58 Ed.Law Rep. [1215]] (Ct.App.1990) (university had burden of proof to demonstrate its course of conduct in dealing with 15-year baseball coach had not created an implied-in-fact contract limiting dismissal of the coach to cause).

For employees with a fixed duration contract, such as most faculty members, not all handbook provisions will be susceptible of enforcement. Courts are reluctant to translate statements of policy that do not directly affect a faculty member's current employment into contract offers. In *Goodkind v. University of Minnesota*,[32] a School of Dentistry faculty member, who was rejected by the dean as department chair after having been recommended by a search committee, could not claim that a School of Dentistry constitution provision concerning selection of department chairs became part of his employment contract.[33] After rejecting the committee's recommendation of plaintiff as chair, the dean appointed an interim chair from within the faculty. The state supreme court reasoned that a policy pertaining to filling a position through a competitive search process must be distinguished from one that would fill an interim position by means of internal promotion. In other words, the process by which a chair is selected did not affect the plaintiff's current employment as a professor in the School of Dentistry. In *Duke v. Arizona Board of Regents*,[34] even though a personnel manual became part of a university staff employee's contract, the manual did not create a right to a higher job classification in the manual where reclassification was subject to the discretion of the director of personnel.

The idea that institutional policies that do not affect a faculty member's employment duties as a faculty member cannot form the basis for a legal claim was also borne out in *Faur v. Jewish Theological Seminary*.[35] In *Faur*, a tenured faculty member who resigned after the Seminary changed its admission policies to permit admission of women had no claim for breach of his employment contract. In sustaining dismissal of the former faculty member's complaint, the court reasoned that the plaintiff "ha[d] not proven the existence of any contractual duty on the part of the defendant to refrain from enforcing its admission policies...."[36] Although the reasoning is slightly different between *Faur* and *Goodkind*, the result is the same, namely that provisions in handbooks (or other similar external documents) may not be enforceable by contract employees where current employment duties are not directly affected by the provisions.

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[31] *See Valles v. Arizona Bd. of Regents*, 154 Ariz. 450, 743 P.2d 959 [42 Ed.Law Rep. [660]] (1987) (university personnel manual applicable to at-will classified staff employee, but manual did not restrict right of university to correct organizational deficiencies and to eliminate plaintiff's position).

[32] 417 N.W.2d 636 [44 Ed.Law Rep. [650]] (Minn.1988).

[33] The plaintiff's argument in *Goodkind* was that the Dean, by rejecting the search committee's recommendation and appointing a new search committee, violated the School's constitution. The provision read as follows:

> Recommendations for candidates to Head(s) or Chairperson(s) of a Department shall be made to the President of the University by the Dean. The candidate shall be selected from among those recommended by a Search Committee appointed by the Dean.... *Id.* at 638.

[34] 150 Ariz. 32, 721 P.2d 1159 [33 Ed.Law Rep. [1256] (Ariz.Ct.App.1986).

[35] 146 A.D.2d 566 536 N.Y.S.2d 516 [51 Ed.Law Rep. [586]] (App.Div.1989).

In order to be part of a contract, handbook language must not only directly affect employees, but must also be sufficiently specific so as to be understood as an offer. Thus, handbook language that an employee can be dismissed for "misconduct," as opposed to "for cause," can be "too indefinite to create an enforceable unilateral contract giving rise to a cause of action for its breach."[37]

However, even where a handbook is part of an employee's contract, the handbook may specify procedures that are conditions precedent to a breach of contract action and failure to follow handbook provisions will negate a breach of contract action. In *Dahlman v. Oakland University*,[38] an Assistant to the President for University Relations failed to use the grievance procedure in the personnel handbook and instead brought a breach of contract action against the university following his being placed on administrative leave until he resigned. Because "[t]he grievance procedure, set forth in the employee's manual, was part of plaintiff's contract of employment,"[39] failure to use that procedure barred plaintiff's action. Requiring employees to exhaust contractual procedures may provide internal mechanisms to resolve disputes without litigation, but will only be applicable where those procedures are available.[40]

Handbook provisions will not prevent an employer from taking action to rescind a contract where an employee has made misrepresentations. In *Morgan v. American University*,[41] a university faculty manual that provided for faculty dismissal upon showing of adequate cause did not abrogate the university's right to rescind a faculty member's contract where he had not disclosed at the time of application that he had concurrent employment with another university.

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[36] *Id.* at 517. Plaintiff also had alleged that the change of policy constituted religious discrimination against him but the court refused to consider this claim because the court would have been drawn into making a decision about religious matters.

[37] *Id.* at 456.

[38] 172 Mich.App. 502, 432 N.W.2d 304 [50 Ed.Law Rep. [895]] (1988).

[39] *Id.* at 305.

[40] *See Gilbert v. Tulane Univ.*, 909 F.2d 124 [62 Ed.Law Rep. [61]] (5th Cir.1990) (employee-at-will did not have access to grievance procedure in handbook where handbook was not part of employment contract).

[41] 534 A.2d 323 [43 Ed.Law Rep. [703] (D.C.Ct.App.1987).

Much of the litigation involving faculty members and faculty handbooks centers around the tenure process. Breach of contract actions involving tenure frequently involve statutory[42] and constitutional[43] issues. Without these issues, traditional contract principles govern the tenure process. In *Moffie v. Oglethorpe University*,[44] a faculty member challenged his denial of tenure on the basis of divided tenure recommendations. The court ruled that the faculty handbook "form[ed] a part of plaintiff's contract of employment,"[45] but the divided recommendations as to tenure sent forth by the dean and division chairman to the president were not in violation of the handbook, which provided that a dean and division chairman were to "formalize and forward to the President a specific recommendation, with supportive data, as to whether or not the faculty member being considered should be offered tenure."[46] Since the handbook did not require that the recommendation be unanimous, no breach of contract occurred. In the absence of more specific contract guidelines or evidence of bad faith, courts give broad discretion to university personnel in interpreting handbook standards for tenure.[47]

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[42] *See, e.g., University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 110 S.Ct. 577, 107 L.Ed.2d 571 [57 Ed.Law Rep. [666] (1990) (female faculty member challenging denial of tenure on basis of race and gender under title VII entitled to disclosure of peer review materials of candidates granted tenure); *Fisher v. Vassar College*, 66 F.3d 379 [103 Ed.Law Rep. [617]] (2d Cir.1995) (no title VII or ADEA claim for faculty member denied tenure because college could distinguish between long leaves to raise children and for other reasons).

[43] *See, e.g., Jeffries v. Harleston*, 52 F.3d 9 [99 Ed.Law Rep. [754]] (2d Cir.1995) (reduction of tenured faculty member's term as chair following controversial off-campus speech not violation of first amendment, but tenure status not affected); *Colburn v. Trustees of Indiana Univ.*, 973 F.2d 581 [77 Ed.Law Rp. [52]] (7th Cir.1992) (handbook provision that nontenured faculty members would be advised of criteria for reappointment too general to create a property interest in continued reappointment); *Spuler v. Pickar*, 958 F.2d 103 [73 Ed.Law Rp. [434]] (5th Cir.1992) (university's handbook did not create protected property right in continued employment or assurance of tenure); *Franklin v. Leland Stanford, Jr. Univ.*, 172 Cal.App.3d 322, 218 Cal.Rptr. 228 [27 Ed.Law Rep. [525]] (1985) (dismissal of private university tenured faculty member for speeches that led to campus disruption and destruction of property subject to first amendment free speech standard where university had gratuitously extended that standard to faculty).

[44] 186 Ga.App. 328, 367 S.E.2d 112 [46 Ed.Law Rep. [837]] (1988).

[45] *Id.* at 113.

[46] *Id.*

Handbook language, however, pertaining to terms of faculty tenure can limit university action, even when a faculty member is later employed in an administrative position without tenure. In *Durham v. Fields*,[48] a faculty member with tenure who had been promoted to a deanship, a position the university president later declared did not carry tenure, was nonetheless still tenured as a faculty member when he was nonrenewed as dean. The court reasoned that tenure, as defined in the faculty handbook, was granted by the board of trustees and, therefore, could not be unilaterally changed by the president.

Compliance with the language of a handbook in terms of satisfying whatever conditions are required to create a contract is a fluid concept. Courts must determine whether the parties' substantial performance constitutes sufficient contract compliance. Substantial performance refers to the absence of willful departure from the essential terms of a contract where the only variance from the strict and literal performance of a contract consists of technical and unimportant omissions or defects.[49] Two separate substantial performance questions are presented with relationship to a breach of contract claim: whether the institution has substantially complied with the provisions in its handbook, such as in satisfying specified procedures; and whether the faculty member/student has substantially complied with the handbook, such as in meeting all requirements for course credit or graduation. Substantial performance in the first situation is an effective response to a breach of contract claim[50] and, in the second situation, affords a faculty member or student a legal or equitable remedy against the institution.[51]

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[47] *See, e.g., Rosen v. Vassar College*, 135 A.D.2d 248, 525 N.Y.S.2d 399 [45 Ed.Law Rep. [769]] (App.Div.1988) (president's interpretation of "evidence of sound scholarship" as basis for tenure could differ from department recommendations and was controlling in absence of bad faith); *Levi v. University of Tex. at San Antonio*, 840 F.2d 277, 281 [44 Ed.Law Rep. [1107]] (5th Cir.1988) (denying tenure to plaintiff for awarding too many high grades and granting tenure to another faculty member for low grades did not violate equal protection; the "University's decision [may be] unwise, but [it was] not irrational"); *Kyriakopoulos v. George Washington Univ.*, 657 F.Supp. 1525 [39 Ed.Law Rep. [120]] (D.D.C.1987) (test in private university for failure to promote faculty member is "gross arbitrariness").

[48] 87 Md.App. 1, 588 A.2d 352 [66 Ed.Law Rep. [1137]] (Md.Ct.App.1991).

[49] Black's *Law Dictionary* 1597 (4th ed. 1951).

[50] *See, e.g., Dillingham v. University of Colo. Bd. of Regents*, 790 P.2d 851 [60 Ed.Law Rp. [225]] (Colo.Ct.App.1989) (refusal to provide medical review hearing as state in Training Agreement upheld, even though defendant required to pay 30 days salary because of failure to furnish 30 days notice as required in Agreement); *Jaksa v. Regents of University of Mich.*, 597 F.Supp. 1245, 1251 [21 Ed.Law Rep. [845]] (E.D.Mich.1984) (student hearing held six weeks and five days after a charge of

## CHANGING THE HANDBOOK

Higher education institutions are organic bodies and the changing nature of the employment and student relationships demands a flexible and changeable document.

> [A]n educational institution, which is a living, changing thing, may not reasonably be expected to remain static; and conversely, change may reasonably be expected. Hence, each statement in a publication of what is now true does not necessarily become a term in the contract between the school and the student [or employee].[52]

The challenge is determining which statements, under what circumstances, present breach of contract issues when changed.

Where handbooks are part of employee or student contracts with higher education institutions, changing the handbook presents an interesting legal challenge: how to alter the handbook during the tenure of the faculty member or student at the institution. The manner in which handbooks can be changed may affect its contractual nature. In *Dunfey v. Roger Williams University*,[53] a discharged admissions officer

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cheating was made, instead of the handbook prescribed six weeks "did not constitute a denial of due process.").

[51] *See, e.g., Russell v. Salve Regina College*, 890 F.2d 484 [57 Ed.Law Rep. [382]] (1st Cir.1989), rev'd 499 U.S. 225, 111 S.Ct. 1217, 113 L.Ed.2d 190 [65 Ed.Law Rep. [1030]] (1991), original judgment reaffirmed on remand, 938 F.2d 315 [65 Ed.Law Rep. [982]] (1st Cir.1991) (student dismissed for failing to lose weight pursuant to contract after completed 124 of 128 credit hours needed for graduation entitled to damages for breach of contract on basis of substantial performance); *Johnson v. Lincoln Christian College*, 150 Ill.App.3d 733, 103 Ill.Dec. 842, 501 N.E.2d 1380 [36 Ed.Law Rep. [815]] (1986) (student dismissed for homosexuality, which was known to the college, entitled to damages and issuance of diploma for breach of contract); *Tedschi v. Wagner College*, 49 N.Y.2d 652, 427 N.Y.S.2d 760, 404 N.E.2d 1302 (1980) (providing student with informal meetings with two deans and president rather than hearing panel required in handbook not sufficient compliance with guidelines). *See also, Harvey v. Palmer College of Chiropractic*, 363 N.W.2d 443 [23 Ed.Law Rep. [667]] (Iowa Ct.App. 1984) (jury question presented as to whether irregularities in student council president's appointment of members to the student judiciary violated written regulations).

[52] *Peretti*, 464 F.Supp. at 787.

[53] 824 F.Supp. 18 [84 Ed.Law Rep. [219]] (D.Mass.1984).

sought to enforce the Personnel Policy Manual provision that an involuntarily discharged administrator was entitled to one month's salary for every six-month's service. However, the Manual provided that "Additional policies and practices or changes may evolve and the Personnel Policy Manual may be amended, modified, suspended at any time. Written notice of such changes will be distributed as soon as possible." In rejecting the former employee's claim, a federal district court held that under Rhode Island law, "the Manual does not create any contractual rights between [the university] and [plaintiff] ... because an employee cannot rely on statements in a manual if the manual can be altered or revoked at any time and for any reason...."[54]

However, whether handbook provisions, unilaterally amendable by a board of trustees, can affect an existing employee contract can vary with state law. In *Zuelsdorf v. University of Alaska, Fairbanks*,[55] nontenured faculty members had vested contract rights under a handbook requiring 15 months notice prior to contract nonrenewal, even though the board of trustees had reserved the right to amend the policies, and had done so to require only 12 months notice. In Alaska, [w]hen one party acquires vested rights under a contract, the other party may not amend the terms of the contract so as to unilaterally deprive the first of its rights; such a change constitutes a modification of the agreement requiring mutual consent and consideration.[56]

Even where the provisions of an employment manual are not part of an employment contract simply because the manual can be changed unilaterally by administration still leaves open the possibility that a contract might be inferred based on detrimental reliance.[57] The strength of student and employee legal complaints can be affected by evidence of detriment. In *Peretti v. State of Montana*,[58] students were

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[54] *Id.* at 22.

[55] 794 P.2d 932 [61 Ed.Law Rep. [1121]] (Alaska 1990).

[56] *Id.* at 935.

[57] *See, e.g., Lewis v. Loyola University of Chicago*, 149 Ill.App.3d 88, 102 Ill.Dec. 425, 500 N.E.2d 47, 48 [35 Ed.Law Rep. [1199]] (1986) (faculty member entitled to tenure when, among other letters, a preemployment letter from the Dean of the School of Medicine stated that "I will propose early tenure for you" and he failed to do so; *Harris v. Arizona Bd. of Regents*, 528 F.Supp. 987 [2 Ed.Law Rep. [76]] (D.Ariz.1981) (faculty member awarded tenure on basis of preemployment statement by the Dean of College of Liberal Arts that the faculty member would receive tenure automatically in the third year. But *see, Bruner v. University of Southern Mississippi*, 501 So.2d 1113 [37 Ed.Law Rep. [747]] (Miss.1987) (statements to prospective coach that he would be hired, coupled with moving to new university, not sufficient to create contract based on detrimental reliance because, under Mississippi state law, only the state board of trustees had authority to issue faculty contracts.

[58] 464 F.Supp. 784 (D.Mont.1979).

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successful in their breach of contract action where the state had terminated a two-year aviation technology program after one year, leaving the students with nowhere to transfer their credits. Normally, universities reserve the right to make changes in programs, but even this authority has limitations. Detrimental reliance in *Peretti* may be distinguishable from Dunfey because the former involves students who may be seen as the weaker partner in a contractual relationship.

University decisions to alter degree or program requirements are frequently ripe for allegations that changes in handbooks constitute a change in the contract between a student and the university. Connected with the issue of whether such changes constitute a breach of contract is the issue of appropriateness of remedy.[59] The more traditional breach of contract remedy at law of damages may not be adequate where damages will not restore the aggrieved party to his/her original position, at which point a court may be called upon to fashion a remedy in equity. For example, a New York court in *Blank v. Board of Education of City of New York*[60] ordered a degree conferred where a college had relied on a new handbook provision to deny credit for courses not taken in residence.[61] In *University of Texas Health Science Center at Houston v. Babb*,[62] a student secured a temporary injunction permitting her to resume attendance at her nursing classes where the university had changed requirements for continuance in a degree program. In *Babb*, the student-university catalog was a contract and the student was entitled to rely on the terms of the catalog under which she entered. On the other hand, a Ph.D. student in *Love v. Duke University*[63] was subject to a University Bulletin change that reduced the number of semesters for passing a preliminary examination, even though the change had occurred after his initial admission to the university. In granting the university's motion for summary judgment, the federal district court found that plaintiff had failed to produce evidence that he was entitled in his Section 1981 claim to a judicial hearing provided in the Bulletin. The court refused to find "that the University Bulletin created a binding contract between [plaintiff] and the university."[64] In large part, the court in *Love* deferred to the need for professional schools to make decisions about enrollment, course requirements and termination. "The court has neither the insight nor the expertise to make decisions concerning student termination, absent proof of intentional discrimination."[65]

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[59] *E.g., cf. Eden v. SUNY*, 49 A.D.2d 277, 374 N.Y.S.2d 686 (1975) (state budget office decision to postpone opening new program in podiatric medicine after students had been admitted and had foregone opportunities to enroll elsewhere resulted in court order to open program) *with Behrend v. State*, 55 Ohio App.2d 135, 379 N.E.2d 617 (1977) (university decision not to pursue accreditation of its School of Architecture after statements had been made to that effect to students by faculty and administrators resulted in award of damages).

[60] 51 Misc.2d 724, 273 N.Y.S.2d 796 (Sup.Ct.1966).

[61] The handbook had internal inconsistencies where plaintiff had participated in a permitted professional option program and the handbook prohibited denying a degree solely on the basis of attendance, whereas the rule about no credit for senior year courses not taken in residence had been added following plaintiff's admission to the college. "[Plaintiff] expended money, time and effort in taking the courses to satisfactory completion, without fair warning that it would later be the sense of the Dean of Faculty to deny him his degree solely because he was not in attendance at the said courses." *Id.* at 802.

[62] 646 S.W.2d 502 [9 Ed.Law Rep. [1099]] (Tex.Ct.App.1982).

[63] 776 F.Supp. 1070 [71 Ed.Law Rep. [124]] (M.D.N.C.1991).

On its face, *Love* seems inconsistent with Babb and *Blank*. However, *Love* represents a genre of cases where university changes that constitute breach of contract encounter judicial reluctance to use its equity power to interfere with matters of judgment by university faculty in interpreting their academic standards.[66] Nowhere does this conflict become more evident than in requests for conferring of degrees. For example, in *Johnson v. Lincoln Christian College*,[67] a student dismissed in his last semester because of homosexuality, which was known to college officials and for which the student had been receiving counseling as directed by the college, stated a cause of action for breach of contract for damages, but the court stopped short of indicating that the college could be ordered to issue a diploma. [W]here the student pays tuition ..., attends classes, completes course work, and takes tests, the school provides the student with facilities and instruction and upon satisfactory completion of the school's academic requirements ...., the school becomes obligated to issue the student a diploma.[68]

The tension between treating a student's complaint broadly as one of contract for which the full range of breach of contract remedies should be available and one of academic standards to which courts should defer to a university's interpretation is not easy to resolve. Part of this tension reflects judicial distinctions between disciplinary and academic misconduct.[69] Generally, courts are disposed to defer to higher education's interpretation of its own academic standards, frequently couching their rationale in the language of academic freedom.[70] Beyond requiring a basic modicum of fair procedures, courts have been reluctant to intrude into institutional decisions regarding student compliance with academic standards.[71] However, judicial reluctance to use its equity power to reinstate a student dismissed because of academic deficiencies[72] or a student punished because of academic dishonesty[73], may not necessarily translate into reluctance in using equity power to grant degrees, especially where a university may have altered its contractual relationship with the student.[74]

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[64] *Id.* at 1075. Section 1981 of the Civil Rights Act prohibits discrimination in making contracts based on race and plaintiff (an Hispanic) did not produce evidence that white students had been provided a judicial hearing prior to academic dismissal.

[65] *Id.* at 1074.

[66] *See Board of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978) (court deferred to expertise of medical school faculty in its dismissal of student in last semester for below average ratings on clinical work, erratic attendance and lack of personal hygiene).

[67] 103 Ill.Dec. 842, 501 N.E.2d 1380 (Ill.App.Ct. 1986).

[68] *Id.* 103 Ill.Dec. at 846, 501 N.E.2d at 1384.

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[69] *See generally, Mawdsley, Academic Misconduct: Cheating and Plagiarism* 45-52 (1994).

[70] *See, e.g., Regents of University of Michigan v. Ewing*, 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 [28 Ed.Law Rep. [720]] (1985) In upholding university dismissal of student for poor academic performance, Supreme Court observed that:

> Added to our concern for lack of standards is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard academic freedom.... Academic freedom is more than the uninhibited interchange among teachers and students, but also applies to autonomous decision-making by the institution.

*Id.* at 514 (citations omitted). *See also, Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978). In reversing a court of appeals decision ordering a medical student, dismissed in her last semester for poor academic performance on clinical work, the Supreme Court observed that:

> The determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of Judicial of administrative decision- making ... Courts are particularly ill-equipped to evaluate academic performance.

*Id.* at 83, 84, 98 S.Ct. at 951, 952.

[71] *See, e.g., Clayton*, 804 F.Supp. at 439 (in upholding a student's suspension for cheating, a federal court found that a hearing for academic misconduct is "not the equivalent of a trial before a judicial tribunal, but it [is] an impartial, fair proceeding with basic due process protections ... [which include] right to a defense advisor, a right to be present and cross- examine witnesses, and a right of review by the President of the University"); *Nash v. Auburn University*, 621 F.Supp. 948, 954 [28 Ed.Law Rep. [1058]] (D.C.Ala.1985) (in rejecting a student's claim of due process entitlement to pre-hearing summaries of University witnesses' testimony, the court observed that "[i]t would be strange if the Constitution were construed to require a student honor court considering a charge of cheating to provide more procedural safeguards than are given to an accused in court whose life is at stake").

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[72] *See, e.g., Susan M. v. New York Law School*, 556 N.Y.S.2d 1104 (N.Y. (1990). In reversing an appellate court's decision ordering reinstatement of law student dismissed for not maintaining a "C" average after being failed on a corporations exam, the New York Court of Appeals observed:

> As a general rule, judicial review of grading disputes would inappropriately involve the courts in the very core of academic and educational decision-making. Moreover, to so involve the courts in assessing the propriety of particular grades would promote litigation by countless unsuccessful students and thus undermine the credibility of the academic determinations of educational institutions.

*Id.* at 1107.

[73] *See, e.g. Clayton v. Princeton University*, 608 F.Supp. 413 [25 Ed.Law Rep. [234]] (D.N.J.1985) (court upheld university's suspension of student for cheating on exam, despite university's failure to follow its rules pertaining to student discipline); *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299, [19 Ed.Law Rep. [917]] (6th Cir.1984) (student expelled for cheating on exam despite student claim that he was denied legal counsel at his disciplinary hearing).

[74] *See Russell v. Salve Regina College*, 890 F.2d 484 [57 Ed.Law Rep. [382]] (1st Cir.1989), rev'd 499 U.S. 225, 111 S.Ct. 1217, 113 L.Ed.2d 190 [65 Ed.Law Rep. [1030]] (1991), original judgment reaffirmed on remand, 938 F.2d 315 [68 Ed.Law Rep. [982]] (1st Cir.1991) (where college had changed its contract with student following admission to nursing program by requiring student to sign weight-loss agreement, court stopped short of requiring college to confer diploma to student where student had completed 124 of 128 credits needed for graduation only because plaintiff's remedy was one of damages and because plaintiff had already earned a nursing degree at another college; however, the court of appeals suggested that ordering conference of a degree would not implicate concerns about a school's academic integrity); *University of Texas Medical School at Houston v. Than*, 834 S.W.2d 422 [76 Ed.Law Rep. [1207]] (Tex.Ct.App.1992) (because a medical student charged with cheating needed a diploma to take a FLEX exam and to enter residency, court ordered university to confer degree, pending review of cheating allegations, even though the university was permitted to record on the diploma that pending litigation may or may not affect the student's standing in the university). *But see, Crook v. Baker*, 813 F.2d 88 [38 Ed.Law Rep. [81]] (6th Cir.1987), reversing 584 F.Supp. 1531 [17 Ed.Law Rep. [1055]] (E.D.Mich.1984) (district court had ordered reinstatement of master's degree revoked for fabricating research but court of appeals upheld university's revocation, finding that student had been accorded his constitutional rights and no section 1983 violation had occurred); *Napolitano v. Princeton University*, 186 N.J.Super. 548, 453

The tension regarding academic decisions for students finds its counterpart in tenure and promotion decisions for faculty. Generally, higher education institutions can determine their own requirements for tenure and promotion and can make changes in those requirements as needed.[75] Changes in tenure and promotion requirements are most likely to come under adverse judicial scrutiny only when they have a discriminatory effect,[76] fall short of constitutional expectations,[77] or breach the terms of contract.[78] For faculty members without tenure, handbooks generally do not create a contractual relationship entitling a person to tenure.[79] However, even if a court finds

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A.2d 263 [8 Ed.Law Rep. [74]] (App.Div.1982) (court upheld university's decision to withhold student's diploma for one year following finding that student had plagiarized a senior paper, even though no student had ever received this severe a punishment).

[75] *See, e.g., Stern v. University of Oklahoma Bd. of Regents*, 841 P.2d 1168 [79 Ed.Law Rep. [290]] (Okla.Ct.App.1992) (university had not breached nontenured faculty member's contract when a Campus Tenure Committee made an independent evaluation of plaintiff's tenure rather than following written procedures followed in other tenure requests); *Jackson v. Harvard University*, 721 F.Supp. 1397 [56 Ed.Law Rep. [889]] (D.Mass.1989) (change in tenure standards regarding creative course development not basis for gender discrimination claim where "reasonable faculty members, acting in good faith, could have found the plaintiff had not satisfied the creative course development requirement for tenure").

[76] *See, e.g., University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 110 S.Ct. 577, 107 L.Ed.2d 571 [57 Ed.Law Rep. [666]] (1990) (first amendment right of academic freedom did not prohibit E.E.O.C.'s subpoena of peer review materials); *Bachman v. Board of Trustees of University of Dist. of Columbia*, 777 F.Supp. 990 [71 Ed.Law Rep. [453]] (D.D.C.1991) (white male demonstrated race discrimination in university's failure to promote him to professor because of changing standards used by the university in the tenure and promotion process).

[77] *See, e.g., Cotnoir v. University of Maine Systems*, 35 F.3d 6 [94 Ed.Law Rep. [104]] (1st Cir.1994) (university failure to provide notice to tenured faculty member it was considering terminating violated his due process).

[78] *E.g., see Welter v. Seton Hall Univ.*, 128 N.J. 279, 608 A.2d 206 [75 Ed.Law Rep. [822]] (1992) (university attempt to change faculty contracts for two nuns by reading into contracts canon law provisions relating to relationship between a cleric and superiors held to be breach of contract as entered into by the nuns and entitled them to $45,000 each in damages).

[79] *See, e.g., Logsdon v. Ohio Northern Univ.*, 68 Ohio App.3d 190, 587 N.E.2d 942 [72 Ed.Law Rep. [1042]] (Ohio Ct.App.1990) (faculty handbook did not create contract with nontenured faculty member entitling him to tenure.

a violation, the remedy of damages or reinstatement for purposes of tenure reconsideration may fall short of actually ordering the awarding of tenure.[80]

For misconduct that is disciplinary in nature, both students and employees are similarly situated. Higher education institutions have always established standards of conduct or performance for employees and students and have enforced those standards, even if the standards change over years and enforcement is not always consistent.[81] The issue of changing nonacademic standards and enforcement raises, in the public sector, a question of due process,[82] and, in the private sector, a question of fairness.[83] However, even if employees and students have a constitutional property interest in their current enrollment or job,[84] they may not necessarily have a right to any particular procedure.[85]

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[80] *See Bachman*, 777 F.Supp. at 997 (in awarding back pay based on the rank of full professor and back retirement fund contributions to faculty member discriminated against in promotion, the court, nonetheless, observed that "it is not well-qualified to judge the relative merits of UDC's faculty members...." The court was precluded apparently in having to order the granting of tenure because plaintiff in the interim between filing the lawsuit and the appellate decision had received his promotion, and thus there is ambiguity whether the court would have actually ordered the promotion or been satisfied to order backpay and frontpay from the date that he proved discrimination in denying his promotion).

[81] *See, e.g., Mueller v. University of Minnesota*, 855 F.2d 555 [48 Ed.Law Rep. [1093]] (8th Cir.1988) (dismissal of tenured faculty member for misuse of university personnel, name, and resources on the basis that such misconduct had interfered with his usefulness to the university upheld as not violating contract or procedural and substantive constitutional rights); *Cosio v. Medical College of Wisconsin, Inc.*, 139 Wis.2d 241, 407 N.W.2d 302 [39 Ed.Law Rep. [1280]] (1987) (student dismissed for cheating could not claim as defense in breach of contract claim the failure of college to prosecute other student cheating where plaintiff had refused to use the student honor system to report violations).

[82] *See, e.g., Samaan v. Trustees of Cal. State Univ. and Colleges*, 150 Cal.App.3d 646, 197 Cal.Rptr. 856 [15 Ed.Law Rep. [298]] (Ct.App.1983) (change in procedure to consider tenured faculty member's dismissal for criminal conviction of grand theft not violative of procedural or substantive due process); *Bleicher v. University of Cincinnati*, 604 N.E.2d 783, 789 [79 Ed.Law Rep. [236]] (Ohio Ct.App.1992) (in upholding dismissal of medical student for [poor scholarship, a court stretched due process to mean that "the standard to be applied is not one of fairness but rather whether the conduct was arbitrary and capricious").

[83] *See, e.g., Klein v. President and Fellows of Harvard College*, 25 Mass.App. 204, 517 N.E.2d 167 [43 Ed.Law Rep. [1133]] (1987) (even though nonfaculty employee had not been shown or given a copy of personnel handbook at time of hire, employee's failure to conform to usual standards of conduct justified her dismissal).

Generally, changes in student or employee handbooks will be enforceable unless changes violate statutory or constitutional provisions.[86] Although courts will award damages,[87] and in some cases reinstatement,[88] for contract violations, they generally will not intrude into the academic process and order awarding of tenure.

## HANDBOOK AMBIGUITIES AND INCONSISTENCIES

Student and employee handbooks frequently contain language that is subject to more than one interpretation, either because the language does not seem to be clear on its face[89] or because the language appears to be inconsistent with other language in the handbook or with institution practice.[90] For an employee or student facing institutional discipline, these ambiguities and inconsistencies raise issues at several levels: the meanings of terms that form the grounds for disciplinary action;[91] the roles of various individuals or groups in a review process;[92] and the procedures to be accorded an employee or student in the review process.[93] Outside the discipline area, ambiguous or inconsistent language can affect student admission to or academic progress within a university,[94] promotion or job security for employees, [95] or entitlement to benefits.[96]

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[84] *See, e.g., Spuler v. Pickar*, 958 F.2d 103 [73 Ed.Law Rep. [434]] (5th Cir.1992) (university faculty handbook language that "tenure is granted to faculty members upon the successful completion of a probationary period" created no property interest expectation of continued employment).

[85] *See, e.g., Newman v. Burgin*, 930 F.2d 955, 961 [67 Ed.Law Rep. [113]] (1st Cir.1991) (whether a university used procedures in its faculty handbook or used different procedures in reviewing a charge of faculty plagiarism was a matter of policy for the university and not a matter of constitutional law; a court will not disturb the institution's decision as long as the faculty member was provided due process. "The Constitution does not require every procedural protection that might help; it simply requires that a private person have a basically fair opportunity to convince the decision maker, by presenting proofs and arguments and evidence and replies to the arguments of others."); *Harris v. Blake*, 798 F.2d 419 [34 Ed.Law Rep. [64]] (10th Cir.1986) (recognizes obligation of university to protect "deprivation of [student's] constitutionally protected interest in continued enrollment" but no set procedure required to protect that interest).

[86] *See, e.g., Marquez*, 648 P.2d at 96 ("reasonable modifications" of handbooks will be upheld as long as made by an educational institution "in good faith exercise of its educational responsibility").

[87] *See, e.g., Russell*, 890 F.2d at 489 (damages equal to one-year's salary awarded where college imposed a new weight-loss contract that resulted in plaintiff being dismissed from nursing program).

[88] *See, e.g., Jones v. Board of Governors of North Carolina*, 704 F.2d 713 [10 Ed.Law Rep. [482]] (4th Cir.1983) (student reinstated to nursing program where Vice-chancellor's decision to overrule hearing panel's finding that the student had not cheated provided no reasons); *Fellheimer* (student found guilty of an offense of which he had not been provided notice was entitled to having his record expunged and another hearing).

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[89] *See, e.g., Cosio*, 407 N.W.2d at 305 (in upholding summary judgment for a medical school that had dismissed a student for cheating, the court responded to the student's allegation that the school had breached its contractual duty to monitor exams and apprehend other students who cheated; "[n]o such duty [to monitor exams] is found in the bulletin of handbook. No such duty will be read into an unambiguous contract on summary judgment").

[90] *See, e.g., Kyriakopoulos v. George Washington Univ.*, 866 F.2d 438 [51 Ed.Law Rep. [740]] (D.C.Cir.1989) (in reversing a trial court summary judgment for the university in denial of promotion for a tenured faculty member, the appeals court determined that a personnel committee's reliance only on refereed publications may have violated printed criteria that would permit consideration of non-refereed publications); *Levi v. University of Texas at San Antonio*, 840 F.2d 277 [44 Ed.Law Rep. [1107]] (5th Cir.1988) (denial of tenure upheld over equal protection and due process claims for faculty member who was lenient in grading, even though the same factor had not been used in evaluating other faculty members considered at the same time).

[91] *See, e.g., Napolitano*, 453 A.2d at 281 (whether the term, "deliberate," in plagiarism definition in student handbook required intent to pass off another's work as one's own and whether the student had, in fact, engaged in such conduct were questions to be answered by the hearing committee); *Corso v. Creighton Univ.*, 731 F.2d 529 [17 Ed.Law Rep. [76]] (8th Cir.1984) (handbook provision requiring full procedural safeguards for "serious penalties" applied to academic as well as nonacademic offenses when a student could be expelled).

[92] *See, e.g., James v. Wall*, 783 S.W.2d 615 [58 Ed.Law Rep. [1057]] (Tex.Ct.App.1989) (students dismissed for cheating on medical school exam granted temporary injunction for reinstatement where handbook provided for review process from Dean of Students to hearing officer to President, but faculty had improperly injected themselves into the process); *Tedeschi v. Wagner College*, 49 N.Y.2d 652, 427 N.Y.S.2d 652, 404 N.E.2d 1302 (1980) (handbook provision specifying a hearing panel for student offenses had not been complied with when the college provided only informal meetings with 2 deans and the president's assistant); *Lyons v. Salve Regina College*, 565 F.2d 200 (1st Cir.1977) (in review process for academic matters, the Dean of Students could overrule a hearing committee's decision to award the student an "I" rather than a failing grade was only a "recommendation" in the handbook).

In addressing contract ambiguities and inconsistencies, courts utilize a number of legal strategies to clarify contract interpretation. A threshold legal question is whether the ambiguity or inconsistency represents a question of law or fact.[97] Often addressed on motions for summary judgment, questions of law and fact offer trial and appellate judges an opportunity to assess whether material facts are in dispute[98] and, if they are not, what the status of the law is so that judgment can be rendered on behalf of one of the parties.[99]

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[93] *See, e.g., Fellheimer*, 869 F.2d at 242 ("[T]he College has an obligation to conduct its hearings in a manner consistent with the terms of the Handbook and a student has a cause of action if he or she can prove the College deviated from the established procedure").

[94] *See, e.g., Regents of University of Michigan v. Ewing*, 474 U.S. 214, 106 S.Ct. 507, 514, 88 L.Ed.2d 523 [28 Ed.Law Rep. [720]] (1986) (medical school's decision not to permit student to retake NBME exam, resulting in his dismissal from medical school, where other students had been permitted to do so and the school had indicated in a promotional pamphlet that second opportunity would be provided not violative of due process because the student's dismissal "was [not] such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment").

[95] *See, e.g., Gray v. Loyola Univ. of Chicago*, 274 Ill.App.3d 259, 210 Ill.Dec. 330, 652 N.E.2d 1306 [102 Ed.Law Rep. [271]] (1995) (in merger of 2 higher education institutions, the tenure rights of faculty in the merged college had to be determined by a jury under Illinois law where the college's handbook was silent on the impact of affiliation with another university on faculty tenure.)

[96] *See, e.g., Dunfey v. Roger Williams Univ.*, 824 F.Supp. 18 [84 Ed.Law Rep. [219]] (D.Mass.1993) (discharged admissions officer not entitled to severance payment specified in handbook because handbook not part of employment contract).

[97] *See, e.g., Healy v. Fairleigh Dickinson Univ.*, 287 N.J.Super. 407, 671 A.2d 182 [106 Ed.Law Rep. [1234]] (N.J.Super.Ct., App.Div.1996) (nontenured faculty member teaching for fourteen consecutive semesters was not entitled to de facto tenure because that provision in handbook identifying when tenure attached did not confer de facto tenure as a matter of law where formal, established tenure procedure had been set forth in handbook); *Fogel v. Trustees of Iowa College*, 446 N.W.2d 451 [56 Ed.Law Rep. [590]] (Iowa 1989) (college handbook language pertaining to basis for faculty dismissal was, as matter of law, too indefinite to create an enforceable unilateral contract giving rise to a cause of action for its breach).

Factual disputes involving handbooks present legal issues concerning the kinds of evidence that can be introduced to prove the nature and intent of the contract. In *Holland v. Kennedy*,[100] a demurrer for a college that had sent a notice of nonrenewal after the March 1 deadline stated in a faculty-staff handbook was reversed and the case remanded for trial. The state supreme court in its decision reasoned that, because the contract was ambiguous, plaintiff "may introduce evidence of past employment practices of the college, oral representations made to him by agents of his employer ..."[101] to support his claim that he had a contract for a definite term. However, handbook language cannot be taken out of context to transfix an indefinite employment-at-will into a fixed term of employment. Thus, in *Roberts v. Wake Forest University*,[102] a golf coach, discharged after less than 2 years, could not rely on handbook language that employees after 3 months changed from probationary to permanent status for purposes of insurance coverage to create a fixed term contract. At best, a permanent employee in North Carolina implies an indefinite employment contract terminable at will. In *Howard University v. Best*,[103] a part-time, non-teaching faculty member, whose 3-year probationary contract nonrenewal had not been complied with under the faculty handbook, unsuccessfully alleged that she was entitled to indefinite tenure under custom and usage. In reversing a $1,000,000 jury award on the indefinite tenure theory but upholding an $155,000 award on a new 3-year appointment theory, the appeals court found that the handbook providing for indefinite tenure upon reappointment after a "previous appointment" did not apply to the faculty member. Custom and practice was binding on the parties only when "the custom [was] definite, uniform and well-known"[104] and plaintiff could, at best, find only one example of a former faculty member who had acquired indefinite tenure through a set of circumstances similar, but not the same as, hers. However, plaintiff was able to prove through custom and practice that, based on past experiences at the university, persons in her circumstances had a reasonable expectation of another 3-year probationary appointment where late notice of nonrenewal had been received.

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[98] *See, e.g., Gray*, 652 N.E.2d at 1310 (in merger between 2 higher education institutions, a question of fact was presented as to the impact of the merger on faculty tenure rights, in light of silence in the merged college's faculty handbook concerning the effect of merger; if the handbook had not intended to abolish tenure upon merger, then "the surviving corporation, under Illinois law, is required to honor and comply with the contracts and obligations of the merged corporation").

[99] *See, e.g., Raines v. Haverford College*, 849 F.Supp. 1009 [91 Ed.Law Rep. [133]] (E.D.Pa.1994) (whether a handbook contains language manifesting an intent to create a contract is a question of law; in this case, the handbook was not part of the contract because it contained a letter from the college president that it was not a contract of employment); *Davis v. University of Montavello*, 638 So.2d 754 [92 Ed.Law Rep. [1048]] (Ala.1994) (language in handbook suggesting a continuing contract not applicable as a matter of law where a staff member's contract was clearly only for one-year).

[100] 548 So.2d 982 [56 Ed.Law Rep. [386]] (Miss.1989).

[101] *Id.* at 986.

[102] 55 N.C.App. 430, 286 S.E.2d 120, 122 [2 Ed.Law Rep. [296]] (1982).

[103] 547 A.2d 144 [49 Ed.Law Rep. [234]] (D.C.App.1988).

The relationship between custom and usage as a basis for introducing evidence to supplement the language in handbooks must be distinguished from using parol evidence to rewrite a contract. The classic parol evidence rule is that "no evidence may be introduced of prior (or contemporaneous) agreements or terms, whether consistent or inconsistent, within the scope of the written agreement."[105] In *Ozerol v. Howard University*,[106] a faculty member nonrenewed after 2 years was not permitted to introduce evidence of oral promises she alleged were made regarding tenure appointment. In reversing a jury verdict for the former faculty member, the appeals court found the contract documents signed by plaintiff, along with the faculty handbook (with its provisions for the tenure process), constituted "a fully integrated expression of the parties' agreement and ... [therefore] any prior oral understandings could not be considered."[107]

## IMPLICATIONS FOR HIGHER EDUCATION

Case law reveals some confusion in higher education regarding the place of handbooks in defining the relationship between institutions and their students and employees. Although handbooks are generally repositories of information concerning rights and responsibilities, the concept of handbooks as part of a contract with commitments and expectations on both sides does not necessarily seem to have universal acceptance. Because the determination of whether handbooks should be part of student or employee contracts is a matter for individual institutions, identifying specific questions to be addressed by each institution rather than suggesting a single answer for all institutions seems to be the best recommendation.

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[104] *Id.* at 151.

[105] *Ozerol v. Howard University*, 545 A.2d 638, 642 [48 Ed.Law Rep. [851]] (D.C.App.1988).

[106] *Id.*

[107] *Id.* at 643.

Does the university intend that all or part of a handbook be part of a student or employee contract? If so, has the portion to be considered part of the contract been identified in the beginning of the handbook? If handbook provisions can be changed, does the handbook indicate by what process that change can occur? If the handbook is changed, have those responsible for formulating the changes addressed the possible detrimental impact those changes may effect on students or employees? Does the information in handbooks reflect actual practices, or does the institution engage in practices that are at variance with language in the handbooks? Does handbook language comport with statutory and constitutional requirements?

## CONCLUSION

Employee and student handbooks are frequently the subjects of litigation because they perform two broad functions: provide information about the institution and establish expectations for its members. Litigation concerning handbooks focuses on two areas: whether handbooks form part of the contract with employees and students; and whether the language in the handbook has been appropriately interpreted. Interfacing with these two areas are such concerns as whether a contract is of fixed term or is of indefinite duration, whether provisions in a handbook are reasonably susceptible to detrimental reliance, whether the parties have substantially complied with contract provisions, and whether information external to the handbook can be introduced to clarify ambiguities or inconsistencies.

COMMENTARY

# REDEFINING THE CONTOURS OF UNIVERSITY LIABILITY: THE POTENTIAL IMPLICATIONS OF *NERO v. KANSAS STATE UNIVERSITY**

by
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* *The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 90 Ed.Law Rep. [989] (July 14, 1994).*

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## INTRODUCTION

Until the early 1960's, the judiciary regarded colleges and universities in this country as standing *in loco parentis* or "in place of the parent" with their students.[1]

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[1] This doctrine developed in the early part of this century. For example, in *Gott v. Berea College*, 156 KY. 376, 161 S.W. 204 (1913), the faculty of Berea College adopted a rule providing that "Eating house and places of amusement in Berea, not controlled by the college, must not be entered by students on pain of immediate dismissal...." *Gott*, at 205. The appellant brought this action seeking a temporary restraining order and injunction against enforcement of the rule, charging that the college and its officers unlawfully and maliciously conspired to injure his restaurant business by adopting a rule forbidding students from entering eating houses. Ruling in favor of the college, the court stated:

> College authorities stand in loco parentis concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the

Because these institutions had the same responsibility as parents, the courts upheld the exercise of broad regulatory and disciplinary powers over student conduct[2] and, theoretically at least, provided a basis for imposing liability for harm to students and

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> government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities or parents, as the case may be, and in the exercise of that discretion, the courts are not disposed to interfere, unless the rules and aims are unlawful or against public policy.

Id. at 206. Similarly, in *People ex rel. Goldenkoff v. Albany Law School*, 191 N.Y.S. 349, 198 A.D. 460 (1921), a third year law student was expelled after he was accused of having sympathy with the doctrines of the Socialist party, disseminating offensive propaganda about the school, and converting students to the Socialist cause. The court held that the faculty, in expelling the student, acted within the scope of its jurisdiction and properly exercised its discretion. The court further noted that it would not interfere in a matter properly left to faculty discretion. Moreover, in *Tanton v. McKenney*, 226 Mich. 245, 197 N.W. 510 (1924), the Court upheld the denial of readmission for female student at Michigan State Normal College because it had found that she:

> had become addicted to the smoking of cigarettes before coming to the institution and continued their use there; that she smoked cigarettes on the public streets of Ypsilanti; that she rode around the streets of Ypsilanti in an automobile seated on the lap of a young man, and was guilty of other acts of indiscretion; and that she aired her grievances and her defiance of disciplinary measures in the public press, which tended to prevent her return to the institution and the maintenance of discipline there.

*Id.* at 247, 197 N.W. at 511. The Court held that in the absence of an abuse of discretion, public school authorities and not the courts should prescribe proper disciplinary measures. The court stated:

> "The dean of women, Mrs. Preddy, who primarily had the matter in charge, showed every consideration for this plaintiff and displayed a motherly interest in her. She urged upon plaintiff's older sister the imperative necessity of getting plaintiff out of the rut she was traveling in and proffered her assistance and aid. Instead of accepting, plaintiff, after consultation with her older sister, proceeded to air her defiance of discipline in the public press. This of itself was sufficient grounds for refusing her readmission."

*Id.* at 253, 197 N.W. at 513 (emphasis added).

[2] *Id.*

damage to others relating from the behavior of students.[3] Thus, the institutions had significant control over their students and a significant exposure to tort liability.

In the 1960's and 1970's, however, the judicial application of this doctrine proved difficult. As university students made revolutionary demands for freedom from authority and the immediate recognition of rights of access, privacy and self-governance,[4] educational institutions and the courts responded by overseeing the destruction of a major barrier to the assertion of individual student will, the concept of *in loco parentis.*[5] This response diminished much of the power of colleges and universities over their students and relieved the institutions of many of the burdens of potential liability which had accompanied such power.[6] Instead, the courts directly or impliedly placed the mantle of accountability upon students for their own misbehavior and misconduct.[7] The institution was, therefore, in a position of having virtually no control over its students, but also almost no potential liability. In effect, institutions reached the opposite extreme of *in loco parentis*.

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[3] Paradoxically, however, few cases were decided in this era in which the courts demanded that the institutions meet the high degree of accountability and responsibility for protection of their charges, which has always been inherent in the parent-child relationship. Instead, the judiciary pursued a philosophy of non-interference. *See*, Michael Clay Smith, "College Liability Resulting from Campus Crime: Resurrection for *In Loco Parentis*?" 59 Ed.Law Rep. [1] (May 10, 1990); William A. Kaplin, "Law On the Campus 1960-1985: Years of Growth And Challenge," 12 J.C.U.L. 269 (Winter, 1985), at 272-274; and William A. Kaplin, *The Law of Higher Education*, 2nd Ed., San Francisco: Jossey-Bass (1985), at 5-6.

[4] There were a wide variety of reasons for these new demands. The messages of independence were graphically presented over a new instrument of communication, television, as society began to grapple with new forms of political accountability. Such actions had roots in part upon the lowering of the voting age; Kaplin, *supra.*, 12 J.C.U.L. at 274; and Kaplin, *supra.*, *The Law of Higher Education*, at 6; new levels of independence being expected of children as the divorce rate soared and two-parent workers multiplied; the emergence of different standards of morality, such as "situation ethics", see A. Smith, Jr., *The Relational Self: Ethics and Therapy from a Black Church Perspective*, 114 (1982), at 114; the decaying of the cities and the birth of the "pill." *See*, G. Talese, *Thy Neighbor's Wife*, 192-193 (1975); L. Tribe, *American Constitutional Law* 1337-62 (2d ed. 1988); Kaplin, *supra.*, *The Law of Higher Education*, at 5-6. The aftermath of the very different battles on the lawns of Berkeley and the streets of Kent State brought monumental changes in the expectations by students, the higher education "consumers," who thrust themselves into the privileges and powers of adulthood almost overnight. Kaplin, *supra.*, *19* J.C.U.L. 269, 272-274; Kaplin, *supra.*. *The Law of Higher Education*, at 5-6.

[5] For example, in *Bradshaw v. Rawlings*, 612 F.2d 135 (3rd Cir.1979), students at Delaware Valley College bought beer for their sophomore class picnic, an annual event An underaged student ordered the beverage and a faculty member co-signed for the money used for the purchase, but the beer was actually delivered to a person of lawful age. One of the students, even though allegedly intoxicated, drove away from the party with another student and crashed after hitting certain "dips" in the city road. The collision resulted in severe injuries which caused the student passenger to become a quadriplegic. The passenger then sued the College, pointing to its rule barring possession of alcohol on campus and the fact that it was generally aware of student

Yet, this new extreme has proven to be just as unacceptable as the extreme of *in loco parentis*.[8] In the face of increasing levels of violent crime on campuses in the past few years, students, parents, and lawmakers have been strong and vociferous advocates of expansion of institutional responsibility for harm to persons in the campus

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drinking, and claimed that it should have controlled the consumption of beer and other behavior of students at the off-campus gathering. However, the Court noted the demise of loco parentis and referred to the absence of host liquor liability in the state, and concluded that it was being asked to place an *impossible duty* upon the institution. However, the Court did impose liability upon the seller of the beer for failing to prevent its consumption by underaged persons and against the city for failing to maintain its roads and to make appropriate warnings about the "dips." Both entities were deemed more capable than the College of protecting against the economic consequences of the risks involved.

Similarly, in *University of Denver v. Whitlock*, 744 P.2d 54 [Ed.law Rep. [950]] (Colo. 1987), a student was injured while jumping on a trampoline at fraternity house, owned by the University of Denver. The evidence showed that a representative of the University had once suggested that the trampoline be taken down, that the University conducted inspections and fire drills, and that it maintained the property. However, the court declined to find that the University had a duty to the student who was injured, noting that university is not an insurer of student activities, that loco parentis had been repudiated, and accordingly the institution was not responsible for the private recreational affairs of its students.

Moreover, in *Rabel v. Illinois Wesleyan University*, 161 Ill.App.3d 348, 112 Ill.Dec. 889, 514 N.E.2d 552 [42 Ed.Law Rep. [1306]] (1987), the Court declined to impose liability on institution for injuries to a women student resulting from being dropped by a male student who was attempting to run a gauntlet formed by members of his fraternity.

[6] *Id.*

[7] *Bradshaw, supra.*, *Whitlock, supra.*, and *Rabel, supra.*

[8] For a critique of the failure of the new doctrine and the absurdities to which it has led, see generally *Bickel & Lake, Reconceptualizing the University's Duty to Provide a Safe Learning Environment*, 20 J.C.U.L. 261 (1994).

community, particularly in propriety areas.[9] Their actions may reflect rising public expectations of the assumption by colleges and universities of an overall legal duty, bordering on strict liability, to protect students against violence.

In response to these developments, the courts are increasingly charting a middle course between the total immunity approach with its recognition of full independence and autonomy for students and revival of educational *in loco parentis* with its total control of students.[10] The exact parameters of this middle course remain unclear.[11]

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[9] Cf. Laws of State of Washington, Chapter 227 (uncodified) (SHB 1082.PL, 1993). *Mullins v. Pine Manor College*, 389 Mass. 47, 449 N.E.2d 331 [11 Ed.Law Rep [5951] (1983); *Eiseman v. State of New York* 109 A.D.2d 46, 489 N.Y.S.2d 957 [25 Ed.Law Rep. [876]] (App.Div.1985), *rev 'd*, 70 N.Y.2d 175.511 N.Y.S.2d 1028, 511 N.E.2d 1128 [41 Ed.Law Rep. [275]] (1987); and *Duarte v. State*, 88 Cal.App.3d 473, 151 Cal. Rptr 727 (1979).

[10] In the 1980's as the crime rate mounted, a new line of cases against colleges and universities appeared like thunderstorms as parents and victims of campus crime became participants in the increased litigiousness of American society. *See Pine Manor College, supra; Eiseman, supra; and Duarte, supra.* New responsibilities were imposed upon institutions to enlarge their control over campus life and to expand their mechanisms of protection for students, sometimes even from harm to themselves.

Unfortunately, for institutions that have chosen to take proactive steps of providing security, the courts have used such action as evidence of foreseeability, stressing malfeasance more strongly than misfeasance. Potentially conflicting areas of public policy also have been given greater priority than the duty of protection. *See Pine Manor, supra*, and *Duarte, supra.*

The more recent cases demonstrate that a university is less likely to be held liable for injuries to its students which are the result of pranks or horseplay, even where the university knows that such activities might occur. The university may face greater liability in situations involving unforeseen attacks by unknown criminal assailants even where the university has no history of previous attacks. One explanation for this trend may be that courts feel that colleges and universities are better able to provide security than are its students who are not in the position to provide that security themselves. However, courts believe that students are in a position to make intelligent decisions about the social and recreational activities in which they choose to participate, decisions which colleges and universities are no longer expected or allowed to make. See, Pamela J. Bernard, "The Criminal Intruder on Campus: A New Era of Foreseeability," *Am I Liable?* NACUA (1989), at 24-25. Compare *Duarte, supra*, and *Pine Manor, supra* with *Bradshaw, supra*, and *Rabel, supra. See* also *Eiseman supra*, and statutes such as the one in Colorado prohibiting discrimination in employment based on an applicant's prior criminal record. Colo. Rev. Stat.§ 24-5-101, "Effect of criminal conviction on employment rights."

As the courts attempt to articulate the exact parameters of this middle course, they encounter difficult choices involving issues of privacy for students, the students' right to be "left alone," and the need to control crime and maintain safety within the community. Addressing these issues involves consideration of two principal legal questions: (1) what, if any, duty is imposed upon colleges and universities to protect student tenants in their housing facilities from violence perpetrated by other students?, and (2) if the duty is that of reasonable care, what is to be deemed foreseeable in the exercise of such duty? To the extent that foreseeability is given a broad interpretation so that suspicion of potential violence by a particular student is sufficient to trigger a duty to protect, academic institutions must wrestle with the policy question of *how much intrusion into the freedom of some students who are suspected of being capable of engaging in violence is necessary to guard the freedom of other students from harm by such persons.* If the examination of these issues triggers a conservative approach of adoption of measures involving control over student behavior generally to guard against the inability of the institutions to recognize or appropriately address the potential violence of a particular student, the freedom of all students may thereby be diminished, and a more pivotal policy issue emerges as the desire of students to be free from institutional control collides with the efforts of the institution to assure their freedom from violence.

Recently, in *Nero v. Kansas State University*[12], the Supreme Court of Kansas was forced to confront these issues. Unfortunately, in doing so, the court apparently changed course toward a magnification of control over students within institutions of higher education. Indeed, if the reasoning of *Nero* is extended to its logical extreme and is adopted by jurisdictions other than Kansas, colleges and universities will be forced to reconsider the suitability of many aspects of contemporary campus life.[13]

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[11] For a possible solution, see Bickel & Lake, *supra* note 8, at 288-94 in which they suggest a rule similar to that articulated in *Tarasoff v. Board of Regents*, 17 Cal.3d 425, 131 Cal Rptr. 14, 551 P.2d 334 (1976). As those authors observed, Tarasoff essentially "proposes that reasonable care be owed in any context except when the departure is justified upon an examination of a list of considerations." The relevant considerations include foreseeability, degree of certainty of harm, closeness of conduct and injury, moral blame, the policy of preventing future harm, the burden and consequences to the defendants and the community of imposing a duty, and insurance cost, availability and prevalence. *Id.* at 289 & 289n. 116.

[12] 253 Kan. 567, 861 P.2d 768 [Ed.Law Rep. [1053]] (Kan. 1993)].

[13] Of course, it is possible that twenty years from now, *Nero* will be considered an anomaly. For the good of American universities, the Authors hope this will be the situation. However, this Article is premised on what would happen if *Nero* were to stand and to be adopted or even expanded by other jurisdictions.

The purpose of the Article is to explore *Nero* and its implications in the hopes of dissuading other courts, educational policy-makers and others from following its flawed course. This purpose will be accomplished in three distinct sections. The first section will outline the facts and judicial analysis in the decision. The second section will critique the flawed judicial analysis of the Supreme Court of Kansas. The final section will explore the potential implications of this decision and attempt to draw some policy conclusions.

## I. THE *NERO* DECISION

In *Nero*, a male student at Kansas State University (the University ) was *accused* of committing a sexual assault upon a female in a co-educational residence hall.[14] The institution responded immediately by moving him from the co-educational residence hall to an all-male residence facility.[15] However, it chose to defer initiation of any additional student disciplinary action pending the outcome of criminal charges brought against the alleged assailant.[16]

The school term ended a few weeks later and the accused male student enrolled in the spring intercession period.[17] At that time he was assigned to live in a co-educational residence hall, which was the only living facility then available for students.[18] A few days later, the male student was accused of a second sexual assault by Ms. Nero, allegedly occurring in a common room of the residence hall.[19] Although the student ***had not been found guilty*** of either alleged sexual assault in any proceeding, the University promptly terminated the accused student s housing contract and ordered him to remove himself and his belongings from the housing facility and to refrain from entering any food service building or residence hall.[20]

Subsequently, the victim of the alleged second assault, Ms. Nero, brought a complaint against the alleged assailant under the University's internal discipline procedures.[21] However, following a plea of guilty by the male student to the first assault in a local court, both criminal charges and the internal student disciplinary charges as to the second alleged attack were dropped.[22]

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[14] *Nero*, 861 P.2d at 771.

[15] *Id.*

[16] *Id.*

[17] *Id.* at 272.

[18] *Id.*.

[19] *Id.*

[20] *Id.*

[21] *Id.*

The female student, Ms. Nero, then instituted a civil suit against the University, claiming that it had a duty to protect her from sexual assaults by other students on grounds that she stood in a "special relationship" to the University.[23] The trial court granted the University's motion for summary judgment and held that the relationship between an institution and its students was not sufficiently "special" to create a legal duty of protection.[24] In doing so, the lower court found the doctrine of *in loco parentis* to be invalid and reaffirmed the principle that institutions have "no legal duty to shield their students from dangerous activities of other students."[25] Ms. Nero then appealed to the Kansas Supreme Court.

After reviewing the facts, discussing the holding of several appellate decisions from other states, and conceding that the doctrine of *in loco parentis* was no longer valid,[26] the Kansas Supreme Court turned to Ms. Nero's theory that her relationship to the University could be likened to that of "parent and child" and that the duty of the University could be appropriately compared to that found in cases in which authorities failed to exercise appropriate care in controlling prisoners, hospital patients, or residents of mental hospitals.[27] Without elaboration, the court simply rejected this theory by stating that the University did not have sufficient control or custody over the alleged assailant to make this theory applicable.[28]

At this point, having rejected both the *in loco parentis* theory and Nero's "custodial control" theory, the court could have simply stopped and affirmed the decision. Instead, however, the court decided that the issue was "more basic."[29] Without any elaboration, the court simply concluded that the University

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[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* at 773.

[26] *See also, Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979), *cert. denied*, 446 U.S. 909, 100 S.Ct. 1836, 64 L.Ed.2d 261 (1980); *Tanja H. v. Regents of the University of California*, 228 Cal.App.3d 434, 278 Cal.Rptr. 918 [65 Ed.Law Rep. [1169]] (1991); *Crow v. State of California*, 222 Cal.App.3d 192, 271 Cal.Rptr. 349 [61 Ed.Law Rep. [187]] (1990); *Baldwin v. Zoradi*, 123 Cal.App.3d 275, 176 Cal.Rptr. 809 (1981); *Eiseman v. State of New York*, 70 N.Y.2d 175, 518 N.Y.S.2d 608, 511 N.E.2d 1128 [41 Ed.Law Rep. [275]] (1987); *Furek v. University of Delaware*, 594 A.2d 506 [69 Ed.Law Rep. [441]] (Del. 1991).

[27] *Nero* at 779.

[28] *Id.*

> is a landlord furnishing housing to its students in competition with private landlords. It owes a duty of reasonable care to its tenants. KSU has discretion to furnish housing to its students. Once that decision is made, the university has a duty to use reasonable care to protect its tenants.[30]

The court then acknowledged the general rule that a landlord is not responsible for the criminal harm to a tenant by a third person unless that action is foreseeable.[31] The court stated:

> We emphasize that a university is not an insurer of the safety of its students. Nonetheless, a university has a duty of reasonable care to protect a student against certain dangers, including criminal actions against a student by another student or a third party if the criminal act is reasonably foreseeable.[32]

Thus, the question then became whether a trier of fact could find that the alleged sexual assault on Ms. Nero was foreseeable. By so holding, the Court effectively concluded that the fact that the alleged assailant had been accused of rape made it possible for a reasonable fact finder to conclude that a further sexual assault by the alleged assailant was reasonably foreseeable.[33] In effect, the Court held that when a person is *accused* of a crime, further criminal actions by that person can be deemed to be reasonably foreseeable for purposes of determining tortious conduct. In other words, the mere *allegation* of wrong doing on the part of a tenant is sufficient to impose a duty on the landlord.

Accordingly, the court remanded the case to the lower court for determination of factual issues, including whether the alleged second attack was foreseeable and whether the University used reasonable care when it placed the accused student in a coed housing unit with the plaintiff and "fail[ed] to warn her and [failed] to institute adequate security measures to protect female students in the same housing unit based upon KSU's knowledge of the reported initial sexual attack."[34]

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[29] *Id.*

[30] *Id.*

[31] *Id.* at 780.

[32] *Id.*

[33] *Id.*

## II. CRITIQUE OF THE *NERO* COURT'S REASONING

At first blush, the *Nero* decision may appear to be a simple landlord-tenant case where the result is appropriate in view of the repetitive nature of the criminal offense involved. However, upon closer examination, it becomes clear that the judicial analysis in *Nero* is seriously flawed and has enormous implications. These flaws manifest themselves in a number of ways.

First, despite the court's rhetoric about a landlord-tenant relationship, the decision clearly does not hinge on that relationship as currently defined in the law.[35] Although the courts have expanded the potential liability of landlords in recent years,[36]

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[34] *Id.* at 782.

[35] A simple hypothetical will illustrate this point. Suppose that a tenant lives in a private apartment complex and is *accused* of a violent crime. Under current law, does the landlord have a duty to the other tenants from the possibility of further violent crimes against them by tenant? *See* note 37, *infra*. Under current law, the answer is no. Unless there is a highly unusual provision in the lease which allows eviction whenever one is *accused*, the landlord cannot evict the tenant. Thus, the tenant must be allowed to remain on the premises until the lease expires. Moreover, while Landlord presumably could tell the other tenants that Suspect has been *accused*, which might have some limited impact, the landlord cannot say that the tenant is a criminal, is a sex offender, is dangerous, or make similar warnings without risking a defamation claim. Essentially, the landlord is powerless to remove the suspected tenant or to effectively warn the other tenants.

[36] D. Dobbs, R. Keeton, & D. Owens, *Prosser & Keeton on the Law of Torts* 442-43 (5th ed. 1984). As those scholars observed:

> Prior to 1970, there was no general tort duty on landlords to protect their tenants against criminal theft or attack. The situation began to change in that year, however, with the landmark decision of *Kline v. 1500 Massachusetts Avenue Apartment Corp.* which imposed a duty of reasonable care upon the owner of an urban multiple unit apartment dwelling to protect its tenants from foreseeable criminal assaults. A growing number of courts have imposed similar duties of reasonable protection upon landlords to protect their tenants, and perhaps others as well, from criminal attack, *provided that such assaults are reasonably foreseeable and preventable.*

*Id.* at 442 43 (emphasis added) (footnotes omitted). Obviously, in order to be reasonably foreseeable, there must be a prior history of such attacks or reason to expect the judiciary has not imposed a general duty to warn or to protect tenants when there is nothing more than a simple *accusation* that a particular tenant committed a crime.[37] Thus, unless the *Nero* majority intended a substantial expansion or modification of landlord-tenant law, something that is not stated or even implied in the opinion, it cannot rest its decision on the principles of landlord-tenant law and remain intellectually honest.

Yet, if the decision cannot be based appropriately on landlord-tenant law, what is the real rationale for the court's decision? Although the court explicitly rejected the concept of *in loco parentis* and Ms. Nero's assertion that there was some sort of special

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them to occur. *Id.* at 443 n. 16. If there is no prior history or other reason to expect the attacks, then the courts will not impose the duty. *See Taylor v. Hocker,* 101 Ill. App.3d 639, 57 Ill.Dec. 112, 428 N.E.2d 662 (1981); *Riley v. Marcus,* 125 Cal.App.3d 103, 177 Cal.Rptr. 827 (1981); *7735 Hollywood Boulevard Venture v. Superior Court,* 116 Cal. App.3d 901, 172 Cal.Rptr. 528 (1981); *Escobar v. Brent General Hospital,* 106 Mich.App. 828, 308 N.W.2d 691 (1981).

[37] The decisions imposing such a duty seem to turn on there being a prior history of attacks or other reason, such as being a high crime area, to expect the attacks to occur. *See* Dobbs, Keeton, & Owen, *supra* note 36 at 442-43 n. 14 and the cases cited therein. When these, conditions do not exist, the courts do not impose liability. *See Id* at 443 n. 16. *See* also the cases cited in the previous note.

Obviously, having a history of acts or being in a dangerous area is very different from having a tenant accused. Thus, the Authors believe that an institution probably does have the potential for liability if there is a history of criminal acts in a particular facility or if the area has a reputation for high crime. In these instances, there is proof of actual prior crimes. When one is accused, however, there is no definitive proof.

The cases seem to support this distinction. The Authors are unaware of single case where a landlord has been held responsible for the subsequent criminal actions of someone who was simply *accused* of a crime. Indeed, one decision holds that liability will not be imposed upon the landlord for a tenant's acts of child molestation even though the landlord knows that a tenant has been *convicted* of child molestation. *N.W. v Anderson,* 478 N.W.2d 542 (Minn.App. 1991). In this case, the landlord knew that one tenant had been convicted of child molestation. Yet, the landlord failed to advise the other tenants of this fact. When the child of a second tenant was sexually assaulted, the second tenant brought suit. Although the landlord knew that the first tenant had been convicted of child molestation, the first tenant was still on probation, the second tenant's family included small children, and the first tenant raised rabbits which tended to attract tenants, the Court held that the subsequent child molestation was not foreseeable. Cf *Tedder v. Raskin,* 728 S.W.2d 343 (Tenn.App.1987) (Landlord not liable for drug-related shooting even though landlord had specific reasons to believe tenant was dealing drugs).

relationship not unlike parent-child, the real basis for the court's decision is an implicit assumption that universities have a special duty to "take care" of students and protect them from harm. Obviously, such an assumption is contrary to the no control/no liability paradigm and is similar to the assumptions which formed the intellectual underpinning for the old *in loco parentis* doctrine.

Second, the court's choice to focus exclusively on the concept of foreseeability,[38] an area which Dean Prosser describes as "one of troubled waters, in which any one can fish,"[39] represents an almost total disregard of the realities of activities on a university campus. Although the question of foreseeability has long been a vexing and a pivotal factor in assessing questions of a university's duty to protect students,[40] *Nero* appears to give it an unwarranted expansive and elastic scope.[41]

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[38] As observed *supra* note 8, Bickel and Lake have suggested that a wide variety of factors in addition to foreseeability be considered.

[39] Prosser and Keeton, *The Law of Torts*, (5th Ed., 1984), at § 43, p. 287.

[40] *See, Am I Liable?*, Pamela J. Bernard, "The Criminal Intruder on Campus: A New Era of Foreseeability," (NACUA, 1989), at p. 15.

Bernard, further notes:

> Foreseeability is an elastic factor, varying from case to case. In the traditional sense, it is established by reference to prior criminal acts on the premises or in the area. Foreseeability can be established by reference to prior criminal acts on the premises or in the area. Foreseeability can be established, however, by factors other than prior crimes. For example, *if the burden on taking security precautions is great, a higher degree of traditional foreseeability will be required.* Security precautions which are relatively minor, but which are not taken, may result in the imposition of a duty even in the face of a low degree of foreseeability. *Some* degree of traditional foreseeability, however. is usually required before imposing liability on a landowner for harm caused by criminal acts of intruders. [Emphasis added].

Bernard, at 17. *Also see,* Anita Raddatz, *Crime on Campus: Institutional Tort Liability for the Criminal Acts of Third Parties*, (NACUA, 1988), pp. 5-7; Philip Burling, *Crime on Campus: Analyzing and Managing the Increasing Risk of Institutional Liability*, (NACUA 1991), pp. 12-15; and Prosser and Keeton, *supra,* Sections 43 and 61 (5th Ed.1984).

[41] The expansion of areas of foreseeable harm is likely to trigger actions by the institution to protect itself against newly-perceived liability. To the extent the required anticipation of student misbehavior is expanded, institutions are likely to place greater

Third, even if one somehow accepts the court's interpretation of foreseeability, the court chose to ignore the fact that the University took *some* measures to secure student safety when it immediately expelled the alleged student assailant from the residence hall where the first act occurred.[42] Yet, this measure was deemed to be insufficient. Such a narrow reading of the institutions action would make it virtually impossible for the institution to avoid liability.[43] It seems unlikely that the institution could have escaped liability by simply refusing to lease further space to the student.[44] Such a drastic step raises severe due process concerns.[45] In effect, the University was

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control over students, which may intensify dependency and inhibit their maturation. Indeed, delinquent and criminal behavior may be motivated by dependency needs. *See* A. Watson, *Psychiatry for Lawyers*, 335-337 (1978).

[42] Ironically, there are some severe due process ramifications to the practice of evicting students simply because they have been accused of a crime, absent observance of appropriate procedures or a clear contractual right to do so. *See, Miller v. Long Island University*, 85 Misc.2d 393, 380 N.Y.S.2d 917 (1976); cf. *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).

[43] Indeed, the result probably would have been the same had the alleged second attack occurred in a residence hall where the student did not live.

[44] Furthermore, would not an attack by that student on any part of the campus have similarly led to violation of the assigned duty? What then, should the University have done? Should it have expelled the student and banished him from the campus?

[45] Some institutions have instituted "banning" policies where serious threats to persons or property exist by "outsiders." *See*, University of Colorado Police Department Manual, Procedure 210 ("Warnings & Exclusions"). Such policies must be structured properly to withstand due process scrutiny. *See, Kirstel v. State*, 13 Md.App. 482, 284 A.2d 12 (1971); *Dunkel v. Elkins*, 325 F.Supp. 1235 (D.Md.1971); and *Watson v. Board of Regents of the University of Colorado*, 182 Colo. 307, 512 P.2d 1162 (1973).

Although the dissenting judge in *Nero* raised serious doubts about the abridgement in student disciplinary hearings of due process rights, particularly with respect to self-incrimination *(Nero, supra.*, at 789), it must be noted that student disciplinary proceedings and governmental judicial proceedings have different purposes and objectives. The former are administrative in nature and seek to determine the fitness of a students for enrollment in their institutions, while the latter are aimed at protection of society. *See*, Kaplin, *supra.*, *The Law of Higher Education*, at 364. Authority exists expressly supporting the proposition that no right to avoid self-incrimination exists in disciplinary cases even when statements might be used against student in a subsequent criminal case. *See, Buttny v. Smiley*, 281 F.Supp. 280 (D.Colo. 1968); *Grossner* v. *Trustees of Columbia University*, 287 F.Supp. 535 (S.D.N.Y. 1968); *Furutani v. Ewigleben*, 297 F.Supp. 1163 (N.D.Cal 1969); and *Nzuve v. Castleton State College*, 133 Vt. 225, 335 A.2d 321 (1975).

caught in a "catch-22" situation where it could not fulfill its duties and, at the same time, protect the rights of accused. The *Nero* court relied on cases which applauded the demise of *in loco parentis* by emphasizing that a university "is not an insurer of the safety of its students nor a policemen of student morality" and by noting that courts should be cautious in abridging the extensive freedom now enjoyed by such students.[46] However, *Nero* readily sanctioned such abridgment, abandoning the principle of student autonomy and independence, by postulating a high degree of control that should have been exercised by the institution with respect to a student who was an accused rapist.

Of course, the court's basic premise was accurate. The institution *theoretically* could have controlled the behavior of the alleged offender in many different ways. It could have refused to rent space in a campus residence hall to him until he proved his innocence. It could have immediately subjected him to a student disciplinary hearing despite the concerns later expressed by one of the members of the court that such action would have substantially compromised his rights to due process in the subsequent criminal proceedings he faced.[47] It could have summarily expelled him, setting an effective example for all other students who might be *accused* of misconduct. It could have confined him to a particular location or facility and restricted his movements on campus.[48] In addition, while the court makes much of the alleged duty to "warn" potential victims as might be expected of a landowner who has an angry dog on the premises,[49] such position is roundly attacked by a concurring and dissenting judge who asks appropriately how such warning might be given: "Word of mouth, publication in the student newspaper, flyers, requiring [the student] to wear sandwich boards stating, 'I am a rapist,' beware?"[50] Although this observation exposes the practical difficulty of implementing the court's suggestion of a warning, a more significant barrier exists under the Family Educational Rights and Privacy Act ("FERPA"),[51] which generally[52] precludes dissemination of such public, personally identifiable information from a student's "educational records."[53] If an institution regularly singled out perpetrators in warnings that were broader than the factual statements contained in its law enforcement records, the institution could risk loss of its federal funds for violating FERPA.[54] It might also face civil liability for its actions

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[46] *Nero*, 861 P.2d at 777, citing *Furek v. University of Delaware*, 594 A.2d 506, 518 [69 Ed.Law Rep. [441]] (Del. 1991). *See also, Whitlock, supra,* and *Bradshaw, supra.*

*Whitlock supra,* at 60, states that intrusion into student freedom should be confined to situations controlled by the institution. A circular problem exists under the reasoning of the *Nero* court as to control and foreseeability in the area of protections of students. Under *Nero,* students are limited in their opportunity to adapt independently to their own University environment with its particular threats or dangers as will be the case when they enter the workforce. Instead, the decision is predicated upon an assumption that, as a landlord, the university can and should control much of the environment of the student, including isolation of accused criminal offenders and delivering warnings to potential victims. Thus, *potential control* is converted to actual control due to the court's mandate that an intrusion into student freedom is deemed warranted. Although precedent exists for imposition of liability upon owners of private living units for acts of third parties *(Connolly v. Nicollet Hotel,* 254 Minn. 373, 95 N.W.2d 657 (1979) (rowdy conduct in hotel convention); and *Uccello v. Laudenslayer,* 44 Cal.App.3d 504, 118 Cal.Rptr. 741 (1975) (landlord could have evicted tenant with vicious dog), apparently no cases have imposed a legal burden upon such owners to take the kind of actions recommended by *Nero* with respect to other private tenants.

[47] *Nero*, 861 P.2d at 789.

[48] This would have been consistent with some of the more egregious actions of government in the past, where human freedom was subverted in the process of assuring

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protection against perceived threats from suspected or accused enemies of the state. At the beginning of World War II, the United States government sent large numbers of innocent Japanese-Americans to internment camps to "protect" the remaining population of this country. Such action was approved by the highest court in the land, see *Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943); *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944), but it has left a stain on its greatness.

[49] *Nero*, 861 P.2d at 780.

[50] *Id.* at 789.

[51] 20 U.S.C. § 1232g(a).

[52] A recent amendment to FERPA, which is a revised version of a measure initiated by one of the Authors and originally introduced by then U.S. Senator Timothy Wirth of Colorado, provides that records which are maintained by an institution's law enforcement office are exempt from FERPA. Accordingly, the fact that a student has been charged with a particular crime can be disclosed and released by an educational institution. However, this does not mean that a university may freely provide warnings about potentially dangerous future conduct of a student who has been charged, nor can the institution provide identifying details about an accused, such as addresses and photographs, which are not in its law enforcement records, but are included in its educational records if the student has filed a request prohibiting the release of information subject to FERPA. Reliance upon the exemption for law enforcement records to make the kind of meaningful warning contemplated by the court is likely to be dangerous. If not disclosed with great care, the institution may face liability for defamation or inadvertently violate provisions under FERPA unrelated to the law enforcement records.

[53] 20 U.S.C. § 1232g(f).

[54] 20 U.S.C.A. § 1232g(a)(1)(A).

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since FERPA has been judicially interpreted to permit civil claims for recovery of damages under Section 1983 of the Civil Rights Act of 1871.[55]

Fourth, the *Nero* court. after explicitly rejecting the assertion that the University occupies a "special relationship" to the injured party akin to the custody of prisoners,[56] turns its logic around. The court effectively creates its own theory of a "special relationship" by implicitly holding that, where a college or university rents space to a student who has simply been *accused* of a criminal act, it may be held liable for subsequent criminal acts by that student.[57] Furthermore, the court eschews the unwillingness of a university to institute disciplinary charges against a student until the charges against such student are resolved by the criminal Justice system, and suggests that the institution is liable for criminal acts of the alleged offender during such period.[58]

Accordingly, under *Nero,* institutions must cast a suspicious eye on all persons within their control or authority who have been accused of criminal activity. Nothing in the court's reasoning indicates the sphere of suspected persons or anticipated victims should be confined to student tenants. Indeed, its holding is broad enough to permit recovery for failure of a college or university to take action to prevent harm by any person known by it to have been accused or convicted of a crime, but is authorized to be on its campus.[59] Essentially, since the court expressly disavows the "special relationship" doctrine, no difference should exist in the duty owed to an institution's student tenants and other legal "invitees" to its property.

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[55] *Krebs v. Rutgers*, 797 F.Supp. 1246 [77 Ed.Law Rep. [238]] (D.N.J. 1992).

[56] *Nero,* at 779. Such a concept, though antithetical to the demise of *loco parentis,* has been applied by some courts where residents of student housing have been harmed, thereby widening the ambit of accountability in terms of broadened foreseeability in assessing a university's duty of protection. *See, Furek v. University of Delaware,* 594 A.2d 506 [69 Ed.Law Rep. [441]] (Del.1991) and *Mullins v. Pine Manor College,* 389 Mass. 47, 449 N.E.2d 331 [11 Ed. Law Rep. [595]] (1983).

[57] *Nero*, at 783-84.

[58] *Id.* at 784.

[59] Imposition of such duty could substantially change the review of applications for employment and perhaps call for background investigations of employers and others who are engaged in business on the campus. It would likely collide with laws aimed at rehabilitation of criminals in some jurisdictions, which prohibit discrimination against persons who have served time in prison. *See,* Colo.Rev.Stat. § 24-5-101 [Effect of criminal conviction on employment,rights]; Calif. Labor Code § 432.7(a) [Employer may ask about convictions but may not penalize employee solely because of a conviction]. It might also create legal concerns in areas such as search and seizure and invasion of privacy, depending upon the degree of scrutiny given to such persons by the institution.

Fifth, while much of the *Nero* court's rhetoric in dictum trumpets the demise of *in loco parentis* with glowing approval, the decision has the net effect of reviving the doctrine. Where the ability to control students becomes the touchstone for exercise of a legal duty based on an assumption that a person accused of a harmful act is likely to commit further harm, does the University then have any choice besides resurrecting *in loco parentis* and curtailing forms of student conduct[60] which have potential for creating harm to others on the campus?[61] Indeed, in this era of tight budgets and increased fiscal responsibility,[62] do administrators not have a new legal duty to take stricter measures to decrease the institution's potential liability for behavior of individual students?

Sixth, from a policy perspective, the court gave little attention to the issue of allocation of the economic risk for harm created by one individual to another. Rather, the court seemed to assume the supposed deep-pockets of the institution should be controlling. Far more attention to the imposition of economic burdens have been given in other areas, such as the imposition of host liability for serving liquor to guests and under-aged persons.[63]

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[60] Implicit in the doctrine of *loco parentis* is the notion that individual students lack sufficient maturity to be responsible for their own conduct and that the government or their educational institution must prevent them from suffering the consequences of their own actions. In effect, if someone makes the wrong choice, it is not the fault of the individual.

While individuals cannot be expected to bear 100% of the responsibility for the consequences of their action, they must bear a good deal. For example, the fraternity pledge who is injured in a hazing incident did choose to participate in the dangerous activity. The institution, while certainly bearing a responsibility to regulate hazing incident did choose to participate in the dangerous activity. Logically, however, the institution, while certainly bearing a responsibility to regulate hazing, should not bear all of the responsibility.

[61] For example, a college or university might be expected to ban the throwing of balls across open space on the campus despite the burden of enforcement because such acts have damaged automobiles and future harm is foreseeable. Or, under a more narrow interpretation of *Nero*, perhaps the student offender should be barred from throwing balls again on the campus or persons should be warned of his/her presence (while other students would be permitted to continue to throw balls unless they hurt somebody). In no way is this example intended to minimize the seriousness of the crime of the alleged assailant in *Nero*. However, the decision was not predicated upon the seriousness of the act in question, but rather was based on its foreseeability and the court's assumption that the institution could have prevented harm by exercising greater control over the future conduct of the alleged offender.

[62] *See, The Chronicle of Higher Education*, "Competing for State Fund," January 25, 1994, at A34.

## III. THE IMPLICATIONS OF *NERO*

In an era in which daily headlines deliver chilling messages about street gangs, drive-by shootings, suits charging sexual harassment by adolescents in elementary schools,[64] and the criminal execution of innocent passengers on commuter trains and workers in fast-food restaurants, higher education administrators will inevitably face mind-numbing challenges[65] as they address future questions involving the protection of students on their campuses and at the same time seek to continue to honor the recognition of student rights and the persona of adulthood which accompanied the "demise" of *in loco parentis*.[66] This is especially true in light of the seemingly irreconcilable collision of legal principles reflected in *Nero.* Indeed, in future years, legal scholars may regard *Nero* as the first shots of a revolution in the law of higher education. Thus, it is necessary to examine several significant changes that may be expected to occur in the administration of housing policies and student disciplinary procedures if the apparent reasoning and principles espoused by *Nero* are adopted and/or expanded in other jurisdictions.

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[63] *See Bradshaw, supra*, at 138; *Kelly v. Gwinnell*, 96 N.J. 538, 476 A.2d 1219, at 1224-25 (N.J. 1984).

[64] The litigation is taking place in several different school districts throughout the country and is often premised on alleged violations of Title IX under the Education Amendments Act of 1972 due to administrative failure to take appropriate remedial action in the face of sexual harassment activity. *The National Law Journal*, December 13, 1993, at p. 10.

[65] A survey by *USA Today* ("Are Colleges Failing to Curb Crime?," October 4, 1988, p. 1) disclosed 20 homicides, more than 13,000 physical assaults, 1,800 armed robberies and 600 rapes annually on campuses of American colleges and universities. Another survey indicated about 70 percent of physical assaults on campuses are committed by students. Such information was derived from reports of less than one-fourth of the total institutions of higher education. "College Liability Resulting from Campus Crime: Resurrection for In Loco Parentis?", 59 Ed.Law Rep. [1] (May 10, 1990 at p. 3-4). Compliance with the reporting requirements under the Student Right-to-Know and Campus Security Act of 1990 (P.L. 101-542, 104 Stat. 2381) will likely provide more accurate and reliable information for assessment of the scope of campus crime and the characteristics of perpetrators. However, disclosure under this law may provide extensive legal ammunition to support claims of foreseeability in future litigation for harm suffered due to the alleged failure of college and universities to protect students. Accordingly, administrators may wish to consider attachment of the relevant report to initial material given to prospective students and to leases for space in residence halls in order to establish a defense of "assumption of the risk."

[66] This challenge is exacerbated and compounded by several other judicial and legislative developments, which either expand institutional duties protecting students or limit the ability of institutions to provide optimal protections. For example, several states have laws prohibiting discrimination against persons with criminal records in hiring and admission to public institutions; *See*, Colo.Rev.Stat. § 24-5-101 [Effect of criminal conviction on employment rights]; N.Y.Executive Law § 296 and Calif.Labor

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Code § 432.7(a), [Employer may ask about convictions but may not penalize employee solely because of a conviction]; Illinois Human Rights Act, Ill.Ann.Stat., Ch. 68, Para. 2-103 [Discriminatory to base any employment decision on an arrest from which no conviction resulted]. In *Eiseman v. State of New York,* 70 N.Y.2d 175.518 N.Y.S.2d 608,511 N.E.2d 1128 [41 E.D.Law Rep. [275]] (N.Y.Ct.App. 1987), the Court gave strong deference to the policy issues surrounding the rehabilitation of criminals where a student had allegedly murdered other students while in a work-release program from a state prison. The courts of some states have limited or negated the duty of inquiry about prior criminal records in tort claims against employers of persons who have committed violent crimes *(Connes v. Molalla Transport,* 831 P.2d 1316 (Colo.1992)); many states have adopted host statutes imposing host liquor liability for persons and entities who permit underaged persons to be served. [*See e.g.,* Colo.Rev.Stat. § 12-46-112.5, "Civil liability for sale, service, or provision of fermented malt beverages to any intoxicated person or any person under the age of twenty-one years -- legislative declaration," and § 12-47-128.5, "Civil liability for sale, service, provision of alcoholic beverages to any intoxicated person -- legislative declaration," *See also, Forrest v. Lowgan.* 833 P.2d 873 (Colo.App.1992); Mich.Stat. § 436.33. "Sales to minors prohibited: signs, defenses"; Mass.Stat. Chapt. 138 section 34, "Sale, delivery or furnishing alcoholic beverages to persons under twenty-one years of age; employment of persons under eighteen years of age"; Calif.Stat., Business & Professions Code, Div. 9, Chapt. 16, § 25658, "Minors; selling or furnishing to; purchases or consumption by; permitting consumption"; Fla.Stat. § 562.11 (1987); Ga.Code Ann. §§ 3-3-22, 3-3-23(a)(1); Mo.Rev. Stat. § 311.310, N.Y.Alco.Bev.Cont. § 65 (McKinney 1987) ]; other states have adopted measures requiring persons to help others who need assistance, imposing criminal misdemeanor sanctions on violators and perhaps triggering civil liability premised on violation of a statute [Minn.St. § 604.05, "Good Samaritan law"; Mich.Stat., § 257.619, "Giving information and aid"; Mich.Stat. § 281.1051, "Casualties involving vessels, rendering assistance," Mich.Stat., § 408.343, "Skiing Accidents; notice; identification of persons involved; penalties," Mass.Stat., Chapt. 143 § 71Q, "Leaving the scene of skiing accident; penalty"; Calif.Stat., Vehicle Code, Div. 10, Chapt. 1, § 20003, "Duty upon injury or death," Calif.Stat., Harbors and Navigation Code, Div. 3, Chapt. 5, § 656, "Collision, accident or other casualty; assistance; liability; employees; report; use or evidence; restricted disclosures; application to certain vessels"]; and at least one state legislature has enacted a provision requiring its institutions of higher education to control misuse of alcohol by students and alcohol-related misconduct, *See,* Laws of State of Washington. Chapter 227 (uncodified) (SHB 1082.PL 1993). In the latter situation, the institutions can attempt to shift their burden through contracts with student organizations.

First, colleges and universities are likely to exercise greater control over the student environment to prevent liability, particularly with respect to student housing. Paradoxically, however, such action may intensify the potential liability of such institutions. Increased intervention in student affairs will likely expand judicial expectations of what institutions are capable of controlling. Furthermore, institutions may feel compelled to intervene in areas in which students should individually take primary legal responsibility, such as harm caused by intoxicated persons,[67] and become liable for improperly carrying out the duty assumed.

Second, a significant change in the administration of student housing is likely to result. Those institutions that are more sensitive to intrusion into student freedom may consider complete privatization of student housing;[68] the creation of "safe" floors with special security for those who feel especially vulnerable; [69] greater disclosure of risks of harm to incoming students to establish assumption of risk, coupled with releases of liability with indemnification and hold harmless clauses. Instead of seeking to attract students with promotional assurances as to the safety of the campus, institutions may include warnings about dangers akin to that of the "risk factor" section of a securities prospectus.[70]

Alternatively, institutions that are willing and able[71] to intrude more on student freedom may re-examine the concept of co-educational housing[72] and provide for special single gender occupancy. They may substantially increase the level of law enforcement protection and security guards in and around residence halls. Archaic and repudiated policies such as "date call," common in colleges and universities in the fifties, in which all women students had to be back in their residence halls by a certain evening hour are likely to be revisited in a broader non-gender context and greater restrictions within student housing may be placed on times of egress and ingress and accessibility to residence hall keys. Similarly, there may be new penalties for such infractions as being in the residence hall room of a member of the opposite sex except within certain prescribed times.[73]

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[67] *See*, Laws of State of Washington, Chapter 227 (uncodified) (8Hs 1082.PL 1993).

[68] However, it is difficult to see why any private firm would wish to enter the business of student housing unless it can exercise substantial control over the students to prevent incidents and/or is compensated, through higher rents, for increased exposure. Therefore, the net result may be higher costs for students living in residence halls.

[69] Paradoxically, such an arrangement may result in increased liablity for the institution when something does happen in one of its residence halls.

[70] If this were to occur, one result might be to diminish the attractiveness of certain urban campuses, while making the more rural institutions more desirable.

[71] Generally, private institutions would be able to intrude into student freedom more than their public counterparts.

[72] *Futrell v. Ahrens*, 88 NM.284, 540 P.2d 214 (N.Mex.1975).

Third, institutions may simply decide that they must warn other students every time they have reason to believe that a student may be a danger to other students. Presumably, this would include warnings about every accusation of criminal activity, every conviction prior to attending the university, and every complaint of non-criminal harassment made against an individual. The implications of such a practice under FERPA,[74] defamation law, and due process are enormous.[75] In addition and far more likely, more extensive review of the backgrounds of students living in institutional housing as well as that of service personnel may be initiated. The idea that virtually any student who is admitted to an institution is allowed to live in student housing may be discarded.

Fourth, institutions of higher education may be forced to revise their student disciplinary procedures to avoid Nero-like results. They may institute procedures for immediate disciplinary hearings in all cases involving accusations of crimes. Such action by those schools that are not inclined to wait for disposition of criminal proceedings may serve to limit the fairness of such actions. It may also result in extreme sanctions due to internal campus pressure at a time that is proximate to a severe injury without adequate attention to individual rights of the accused.[76]

Fifth and perhaps most significantly, there is no reason why the standard of foreseeability in *Nero* will not be extended beyond the relatively narrow context of student housing. It is not difficult to imagine the same standard being applied to other forms of behavior such as campus drinking, fraternity and sorority hazing, non-criminal sexual harassment, and abuse by athletic coaches and/or faculty members. Indeed, virtually every aspect of college life could suddenly become a means of subjecting the institution to liability. In such a situation, Jefferson's vision of an academical village where students and scholars lived and learned together[77] may be obfuscated by legal considerations.

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[73] Moreover, these penalties may be far more severe than those which are presently imposed by the few institutions which have such penalties.

[74] 20 U.S.C. 1232g.

[75] For example, *See, Greenya v. George Washington University*, 512 F.2d 556 (D.C.Cir.1975); *Shearer v. Lambert*, 274 Or. 449, 547 P.2d 98 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); and *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

[76] Surprisingly, the Nero court made little of the fact that the accused student should be presumed innocent until he has had notice and a hearing by disposition of his case in either disciplinary hearing or under the applicable criminal justice system. *See, Nero*, dissenting opinion, at 789, where Justice McFarland notes that: "The majority opinion, in essence, requires the University to presume guilt, treat the accused as a pariah, and ostracize him from all female students."

## CONCLUSION

History has demonstrated that neither the doctrine of *in loco parentis* nor its polar opposite, institutional abdication, is an acceptable means of defining university liability.[78] Rather, as educational institutions prepare for the third millennium, the institutions, educational policy makers, and the courts must chart a middle course. In this middle course, the institution must take some responsibility for harm within the campus community and, at the same time, must respect the substantial freedoms of individual autonomy, privacy, and due process. Similarly, in this middle course, individual students must learn to bear the consequences of their own actions and not look to the institution to be a guarantor against all harm.

In *Nero*, the Supreme Court of Kansas was presented with a unique opportunity to define the parameters of the middle course. Yet, instead of seizing the opportunity and charting new waters, the court apparently embraced the notion that universities must "take care" of their students. In doing so, *Nero* may well have signaled the application of a new form of in loco parentis.[79]

Only time will tell if *Nero* is the alpha of a new era where universities once again face almost unlimited liability for the harms which befall their students. Hopefully, courts, educational policy-makers, and others will recognize the flawed reasoning and tremendous implications of *Nero* and will seek to avoid its mistakes and develop an acceptable middle course. If they do not, then the doctrine of in loco parentis may prevail once again.

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[77] This was his dream for the institution he founded, the University of Virginia. *See*, Thomas Jefferson's Letter of September 7, 1814, reprinted in *The Life and Selected Writings of Thomas Jefferson*, 642 48 (Koch & Peden, eds. 1944, 1972 printing).

[78] *See* generally, Bickel & Lake, *supra* note Q.

[79] The *Nero* reasoning, if widely adopted, portends significant future vulnerability and disruption within institutions of higher education. It is also likely to lead to a major call on scarce resources for colleges and universities in changing their relationships with students in the critical areas of housing and disciplinary processes. For recent decisions representing a more enlightened approach to the question of foreseeability, *See, Ravisong v. Lakewood Community College*, 504 N.W.2d 778 [85 E.D.Law Rep. [270]] (Minn.App.1993); *Leonardi v. Bradley University*, 253 Ill.App.3d 685, 192 Ill.Dec. 471, 625 N.E.2d 431 [87 E.D.Law Rep. [1028]] (Ill.App.3d 1993); and *Fisher v. Northwestern State University*, 624 So.2d 1308 [86 E.D.Law Rep. [576]] (La.App. 3 Cir.1993).

A Symposium on Health Care Reform--Perspectives in the 1990s
Note

# THE COLLEGE'S EMERGING DUTY TO SUPERVISE STUDENTS: IN LOCO PARENTIS IN THE 1990s

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## INTRODUCTION

The modern college campus is a dangerous place.[1] Students frequently fall victim to criminal attacks such as rape and sexual assault.[2] Alcohol consumption[3] often leads to serious injury.[4] Under negligence law, the extent of the college's duty to protect students

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[1] According to a recent New York Times article:

> An American college or university (enrollment ranges from under 100 students to 45,000 and more) averages three reported violent assaults a year, eight incidents of hate crime or hazing violence, 430 property crimes and countless alcohol violations. Like much off-campus crime, many more incidents go unreported. One in three students will be the victim of some kind of campus crime. Estimates on the number of women raped or sexually assaulted during their college years range from 1 in 7 to 1 in 25. Anne Matthews, *The Campus Crime Wave*, N.Y Times, Mar. 7, 1993, § 6 (Magazine), at 38.

Some commentators have even pointed to studies indicating that the number of college women forced to engage in sexual acts against their will is 1 in 4. Larry King Live (CNN television broadcast, Sept. 10, 1993) (statement of Andrea Parrot, professor at Cornell University and authority on on-campus violence against women).

[2] *See*, e.g., *Hartman v. Bethany College*, 778 F. Supp. 286, 289 (N.D. W. Va. 1991) (student assaulted by two men after leaving bar close to campus); *Tanja H. v. Regents of the Univ. of Cal.*, 278 Cal. Rptr. 918, 919 (1991) (student gang raped by football players living on her dormitory floor); *Duarte v. State*, 148 Cal. Rptr. 804, 806 (Cal. Ct. App. 1978) (student raped and murdered in residence hall), vacated, 151 Cal. Rptr. 727 (Cal. Ct. App. 1979); *Relyea v. State*, 385 So. 2d 1378, 1380 (Fla. Dist. Ct. App. 1980) (students abducted from campus, then assaulted and murdered); *Klobuchar v. Purdue Univ.*, 553 N.E.2d 169, 170 (Ind. Ct.

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App. 1990) (student held at gunpoint by deranged ex-husband); *Nero v. Kansas St. Univ.*, 861 P.2d 768, 771-72 (Kan. 1993) (student raped by fellow dormitory resident); *Mullins v. Pine Manor College*, 449 N.E.2d 331, 334 (Mass. 1983) (student raped by unknown intruder on campus); *Brown v. North Carolina Wesleyan College*, 309 S.E.2d 701, 701 (N.C. Ct. App. 1983) (student abducted, raped, and murdered following on-campus basketball game).

[3] According to one commentator:

> Even before they begin their first day of college, say many experts on student life, a large number of undergraduates are messed-up, increasingly adept (often since high school) at reckless drinking and reckless sex, increasingly burdened by messy family histories, increasingly unprepared for college course work. Matthews, *supra* note 1, at 38, 47. The author noted that "intoxicated students routinely smash toilets, yank out sinks, punch through ceilings, head-butt street lamps, uproot ornamental trees and body-slam vending machines ..." *Id.* at 42.

[4] For cases involving injuries suffered by students, *see Kleinknecht v. Gettysburg College*, 989 F.2d 1360, 1363-64 (3d Cir. 1993) (student suffered fatal heart attack during lacrosse practice); *Bradshaw v. Rawlings*, 612 F.2d 135, 137 (3d Cir. 1979) (student rendered paraplegic after car accident occurring while passenger in car of classmate who had become intoxicated at class picnic), *cert. denied*, 446 U.S. 909 (1980); *Booker v. Lehigh Univ.*, 800 F. Supp. 234, 235-36 (E.D. Pa. 1992) (intoxicated student injured after falling and hitting her head on a rock while taking wooded shortcut), *aff'd mem.*, 995 F.2d 315 (3d Cir. 1993); *Rehberg v. Glassboro St. College*, 745 F. Supp. 1113, 1114 (E.D. Pa. 1990) (student injured in car accident after drinking at fraternity party); *Baldwin v. Zoradi*, 176 Cal. Rptr. 809, 811 (1981) (student engaging in "speed contest" injured in car accident after on- campus drinking); *University of Denver v. Whitlock*, 744 P.2d 54, 56 (Colo. 1987) (en banc) (intoxicated student injured while attempting a back flip on a trampoline); *Furek v. University of Del.*, 594 A.2d 506, 510 (Del. 1991) (fraternity pledge injured during initiation event when student poured oven cleaner over pledge's body); *Walker v. Daniels*, 407 S.E.2d 70, 72-73 (Ga. Ct. App. 1991) (student drowned in campus pool); *Rabel v. Illinois Wesleyan Univ.*, 514 N.E.2d 552, 554 (Ill. App. Ct. 1987) (female student injured when an intoxicated individual dropped her while running with her on his shoulder), *cert. denied*, 520 N.E.2d 392 (1988); *Swanson v. Wabash College*, 504 N.E.2d 327, 329 (Ind. Ct. App. 1987) (student injured by thrown baseball); *Campbell v. Board of Trustees*, 495 N.E.2d 227, 229 (Ind. Ct. App. 1986) (passenger in automobile driven by intoxicated student injured when automobile crashed into ditch); *Pitre v. Louisiana Tech Univ.*, 596 So. 2d 1324, 1332 (La. Ct. App. 1992) (student crashed into light pole while sledding on university hill); *Millard v. Osborne*, 611 A.2d 715 (Pa. Super. Ct.) (intoxicated student killed in automobile accident following fraternity party), *cert. denied*, 615 A.2d 1312 (Pa. 1992); *Beach v. University of Utah*, 726 P.2d 413, 415 (Utah 1986) (student injured after falling off of a cliff while intoxicated).

from such misfortunes remains unclear.[5]

American colleges historically provided for the physical well-being of their students.[6] This was derived from the traditional *in loco parentis*[7] student-college relationship.[8] During the 1900s, colleges began to abandon this role and by 1970, *in loco parentis* seemed defunct.[9] Since then, courts have widely held that the demise of *in loco parentis* justifies the refusal to hold colleges responsible for protecting and supervising students.[10]

This trend began to reverse in the 1980s, when some courts recognized a duty to protect students from on-campus criminal attacks.[11] In the 1990s, however, some courts have recognized a broader duty, essentially a responsibility to protect students from their own reckless behavior, and from the reckless and often criminal acts of their classmates.[12] A duty to supervise students, not just to protect students, is emerging in the 1990s.

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[5] *See* Amy Stevens, *Personal-Injury Lawsuits by Students are Endangering University Budgets*, Wall St. J., Nov. 18, 1992, at B1. Stevens noted that recent court cases have left university administrators unsure of their legal responsibilities regarding student safety. *Id.*

[6] See Brian Jackson, *Note, The Lingering Legacy of In Loco Parentis: An Historical Survey and Proposal for Reform*, 44 Vand. L. Rev. 1135, 1138-40 (1992) (describing the traditional custodial relationship between the student and college). See also *infra* part I.B.

[7] Black's Law Dictionary defines *in loco parentis* as: "[I]n the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties, and responsibilities." Black's Law Dictionary 787 (6th ed. 1990).

[8] For a discussion of the *in loco parentis* relationship, *see infra* part I.B.

[9] *See*, e.g., *Buttny v. Smiley*, 281 F. Supp. 280, 286 (D. Colo. 1968) (noting that "the doctrine of 'In Loco Parentis' is no longer tenable in a university community"); see generally William A. Kaplin, The Law of Higher Education 5-7 (2d.ed. 1985) (outlining factors leading to the demise of the *in loco parentis* doctrine); Jackson, *supra* note 6, at 1142-44 (same); Theodore C. Stamatakos, *Note, The Doctrine of In Loco Parentis, Tort Liability and the Student-College Relationship*, 65 Ind. L.J. 471, 474-76 (1991) (same). *See* generally *infra* notes 33-43 and accompanying text for a discussion of the demise of *in loco parentis*.

[10] *See* James J. Szablewicz & Annette Gibbs, *Colleges' Increasing Exposure to Liability: The New In Loco Parentis*, 16 J.L. & EDUC. 453, 456-57 (1987) (noting that "courts rejected negligence claims against colleges" after the demise of the *in loco parentis* doctrine); Timothy M. McClean, *Note, Tort Liability of Colleges and Universities for Injuries Resulting From Student Alcohol Consumption*, 14 J.C. & U.L. 399, 402 (1987) (noting that the establishment of a duty poses the most significant obstacle towards establishing a prima facie case of negligence for the failure to control student alcohol consumption). See *infra* part II.

[11] *See infra* part III.

This has left college administrators uncertain regarding what responsive measures to institute.[13] Most, however, have responded by increasing student supervision and restricting dangerous activities.[14] Students, meanwhile, continue to file personal injury law-suits against colleges in growing numbers.[15]

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[12] According to the *Wall Street Journal*, these new decisions deviating from the accepted view stem "from renewed judicial ambivalence over whether college students are fully accountable adults or kids who need protection from themselves." Stevens, *supra* note 5, at B1. See generally *infra* part IV.

[13] The *Wall Street Journal* noted that institutions are without "clear legal guidelines" and "uncertain" as to when they might be accountable for injuries to students. Stevens, *supra* note 5, at B1. *See* also McClean, *supra* note 10, at 413 (noting that recent decisions create a dilemma because they hold colleges to a duty to enforce their protective policies, making it prudent not to institute such policies).

[14] *See Clampdowns Cause Different Problems*, U.S.A. Today, Apr. 8, 1991, at 50 [hereinafter Clampdowns] ("While colleges investigate new ways to curb drinking through education, the threat of lawsuits has them redoubling old-fashioned efforts to monitor underage drinkers or ban alcohol from campuses."); Kathryn Kranhold & Katherine Farrish, *Anxiety About Sex, Dating, Rape Transforms College Life*, Hartford Courant, Oct. 10, 1993, at A1 ("[I]n response to ... fear of lawsuits ... [colleges] are adopting increasingly intrusive policies."); Matthews, *supra* note 1, at 38, 47 (noting "newfound paternalism" as a result of increased liability); CNN & Company (CNN television broadcast, Apr. 5, 1993) (noting "new paternalism" in american colleges and universities) [hereinafter CNN & Company].

[15] *The Wall Street Journal* described a "new wave of personal-injury suits by students, many of whom claim the schools should have protected them from their own youthful mistakes." *See* Stevens, *supra* note 5, at B1. Personal injury suits against universities have "risen significantly" in the last five years. As a result, most schools now employ full time legal staffs. *Id.* at B6. William Kaufman, Vice President and General Counsel of the University of Alaska, Fairbanks, noted that, "There appears to be a greater tendency for people to look to the university for compensation for any injury, regardless if the matter was wholly in the control of the individual." *Id.*

The increase in lawsuits against colleges can also be seen as a by-product of the general litigation explosion. *See* Stamatakos, *supra* note 6, at 488 (noting that colleges have not been immune "from the general expansion of tort liability that has occurred over the last twenty-five years"). The litigation explosion began in the 1960s partially as a result of the increased willingness of courts to recognize new bases of liability. *See* Peter H. Schuck, “Introduction” to The American Assembly, Tort Law and The Public Interest 19 (Peter H.

This Note discusses the emerging duty of colleges to supervise students under the *in loco parentis* theory.[16] Part I discusses the student-college relationship, focusing on the traditional *in loco parentis* relationship, and briefly examining contractual methods of determining the relationship. Part II examines cases that limit the duty of colleges. Part III addresses cases that have imposed on colleges a duty to provide adequate security on campus. Part IV examines recent cases in the 1990s that have imposed on colleges a broader duty to monitor students in an effort to protect them. Finally, Part V analyzes the emerging duty to supervise in terms of traditional tort duty analysis, and discusses policy factors that may be guiding these courts. This section concludes that recent attempts to impose supervisory responsibilities on the college should be embraced with caution.

## I. THE STUDENT-COLLEGE RELATIONSHIP

### A. Duty and Negligence Law

"Duty" is an element of the prima facie negligence case.[17] Whether a duty is owed is a question of law.[18] Common-law negligence differentiates between active negligence, or misfeasance, and passive negligence, or nonfeasance.[19] The failure of the university to

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Schuck ed., 1991).

[16] This Note does not discuss numerous other theories on which a student can posit liability against a college, such as the affirmative negligence of the college, agency principles, or intentional torts. Additionally, this Note does not address the college's possible liability under dram shop statutes or under social host liability.

[17] W. Page Keeton, et al, *Prosser and Keeton on The Law of Torts* § 30, at 164 (5th ed. 1984). Under the traditional approach to negligence, four elements compose a negligence cause of action: (1) a duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks; (2) a failure on the actor's part to conform to that standard, or a breach of the duty; (3) an injury resulting from that breach; and (4) a reasonably close causal connection between the injuries and the breach. Keeton, *supra*, § 30, at 164-65. The negligence framework can also be discussed in terms of duty-risk analysis. *See* E. Wayne Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury*, 1977 Utah L. Rev. 1, 22-32.

[18] Keeton, *supra* note 17, § 45, at 320.

[19] *Id.* § 56, at 373. The common law distinguishes between active negligence, misfeasance (e.g., driving carelessly) and non-active negligence, nonfeasance (e.g., failing to come to the aid of an injured party whose injuries the actor did not cause). *Id.* § 56, at 363-75.

protect or supervise its students is nonfeasance, or the failure to take affirmative action.[20] There can be no duty to take affirmative action without the existence of a "special relationship" between the parties, a relationship that the law recognizes as warranting an exception from the general rule.[21]

In addition to the existence of a special relationship, a duty to take affirmative action requires a finding that non-action creates a foreseeable and unreasonable risk.[22] To determine whether a risk is unreasonable, courts weigh the gravity and probability of the harm associated with such non-action against the societal burdens that correspond with imposing such responsibilities.[23] Accordingly, duty is essentially a policy question.[24]

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[20] *See, e.g., University of Denver v. Whitlock*, 744 P.2d 54, 57 (Colo. 1987) (en banc) ("University is charged with negligent failure to act rather than negligent affirmative action.").

[21] *See* Keeton, *supra* note 17, § 56, at 363-75. The misfeasance/nonfeasance distinction is rooted in the refusal of early courts to hold persons liable for non-action. *Id.* § 56, at 373. English judges "shrank from converting the courts into an agency for forcing men to help one another." *Id.* According to Prosser and Keeton, "[D]uring the last century, liability for 'nonfeasance' has been extended still further to a limited group of relations, in which custom, public sentiment and views of social policy have led the courts to find a duty of affirmative action." *Id.* § 56, at 373-74.

Section 314A of the *Restatement (Second) of Torts* lists special relationships that courts have commonly accepted as allowing a duty to protect another. The list, which the Restatement states does not preclude the finding of other special relationships, includes: the common carrier and passenger; the innkeeper and guest; the possessor of land and invitee; and the custodian and ward. *Restatement (Second) of Torts* § 314(a) (1965).

The *Restatement* lists additional relationships that allow a duty to supervise third parties. They include: the duty of parents to control their children; the duty of masters to control their servants; the duty of possessors of land or chattels to control the conduct of licensees; the duty of those in charge of persons having dangerous propensities; and the duty of persons having custody of another to control the conduct of third persons. *Id.* §§ 316-320.

[22] *See Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100 (N.Y. 1928) ("The risk reasonably to be perceived defines the duty to be obeyed."); Keeton, *supra* note 17, § 31, at 170.

[23] According to section 291 of the *Restatement (Second) of Torts*:

> Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done. *Restatement*

Because duty has its foundation in policy concerns, the analysis changes with social norms.[25]

### B. *In Loco Parentis*

Early American educational institutions[26] emphasized discipline and structure.[27]

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*(Second) of Torts* § 291 (1965).

Comment f. to section 291 specifically applied this test to finding a duty to take affirmative action:

> Even where the relationship or precedent act is one which usually creates a duty of protective action, no such duty exists if the benefit to the other is less than, or merely equal to, the utility of action or inaction to the actor. *Id.* § 291, cmt. f. The Restatement further set out factors to be considered in determining the utility of the affirmative action and risk of non-action. *See Id.* §§ 292-293; *infra* notes 214 & 224. *See* also *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 342 (Cal. 1976). In *Tarasoff*, the court explained that judges should only depart from the traditional rule of non- liability for nonfeasance:
>
> > [U]pon the balancing of a number of considerations; major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved. *Id.* (citations omitted).

[24] "Duty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." Keeton, *supra* note 17, § 53, at 358.

[25] *Id.* § 43, at 359.

[26] The founders of the first American colleges emulated English institutions. Jackson, *supra* note 6, at 1139. Graduates of and teachers from the Cambridge and Emmanuel Colleges in England founded early American institutions. *Id.* at n.22.

[27] Gerard A. Fowler, *The Legal Relationship Between the American College Student and the College: An Historical Perspective and the Renewal of a Proposal*, 13 J.L. & Educ. 401,

Courts granted to colleges great deference in formulating these restrictive policies, reasoning that colleges functioned *in loco parentis*, or in the place of the students' parents.[28] Accordingly, courts blocked attempts to question the college's power, much as they would restrict a minor's attempt to sue his parents.[29]

*In loco parentis* was also characterized by a custodial relationship between the college and the student.[30] College administrators exercised a parental role in securing the

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408-09 (1984). Other authors describe a particularly harsh system of punishment in the early years of Harvard College: "Mistress Eaton and her servants made domestic life unbearable for the freshmen who boarded in with her, and Master Eaton ruined the 'scholastic' side of freshman living by flogging the young men for disciplinary lapses." M. Lee Upcraft & John N. Gardner, *The Freshman Year Experience* 29 (1989) (citation omitted).

[28] *See*, e.g., *John B. Stetson Univ. v. Hunt*, 102 So. 637, 640 (Fla. 1924) (deferring to university judgment when confronted by student allegation that university expelled him without cause and in bad faith); *Gott v. Berea College*, 161 S.W. 204, 206 (Ky. 1913) (noting that courts should grant great deference to university authorities unless the university policies are unlawful or against public policy); *Woods v. Simpson*, 126 A. 882, 883 (Md. 1924) (stating that the college administration must "be left untrammeled in handling the problems which arise, as their judgment and discretion may dictate...."); see also Paul D. Carrington, *On Civilizing University Discipline*, in Law and Discipline on Campus 71 (Grace W. Holmes ed., 1971) ("Academic discipline used to be a cozy, family affair. The benign dean played the firm, fair father; his students, like good children everywhere, never questioned his integrity or his wisdom."). For a definition of *in loco parentis*, *see supra* note 7. Blackstone applied *in loco parentis* to the educational context in 1770 as follows:

> [The father] may also delegate part of his parental authority ... to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such portion of the power of the parent committed to his change, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed. 1 William Blackstone, Commentaries *

[29] *See*, e.g., *Illinois ex rel. Pratt v. Wheaton College*, 40 Ill. 186, 187 (1866) ("A discretionary power had been given [college authorities] to regulate the discipline of their college in such manner as they deem proper.... [w]e have no more authority to interfere than we have to control the domestic discipline of a father in his family.") (emphasis added).

[30] Stamatakos, *supra* note 9, at 474; Szablewicz & Gibbs, *supra* note 10, at 454 (noting that during the *in loco parentis* period, when parents placed "their children in the college's hands, parents transferred their parental authority and obligations to the schools").

"physical and moral welfare" of their students.[31] It is unclear, however, whether *in loco parentis* provided a basis for a tort duty during its heyday.[32]

*In loco parentis* began to decline in popularity in the late nineteenth century when the German model of higher education emerged.[33] German higher education envisioned large and diversified institutions, and exhibited little concern for the private life of the student.[34] In the early twentieth century, state institutions embraced this idea because it allowed them to educate a larger student body.[35] German education increased in popularity after World War II because it allowed institutions to accommodate the soldiers sent to college on the G.I. Bill.[36] Enrollment increases resulting from the baby boom further contributed to the popularity of the German model.[37]

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[31] *See*, e.g., *Gott v. Berea College*, 161 S.W. 204, 206 (Ky. 1913) ("College authorities stand *in loco parentis* concerning the physical and moral welfare ... of the pupils...."). In *Gott*, the plaintiff, who owned a saloon near the college, sought to enjoin enforcement of a rule that made patronage of his establishment an expellable offense for students. The court deferred to the college's parental decision making responsibilities. *Id.* at 207.

[32] Few opinions written during the time of *in loco parentis* discussed college tort liability, and none of these cases mentioned *in loco parentis*. One commentator suggested that the doctrine of *in loco parentis* never provided the "special relationship necessary for liability to obtain." Stamatakos, *supra* note 9, at 483. This author executed a series of LEXIS searches, "using various combinations of 'colleges,' 'universities,' 'in loco parentis,' and 'injury,'" all of which failed to find any cases discussing *in loco parentis* in conjunction with college tort liability. *Id.* at 483 n.62.

Nevertheless, other commentators have asserted that the lack of appellate cases does not prove that the doctrine was inapplicable in tort. Szablewicz & Gibbs, *supra* note 10, at 455-56. According to these authors:

> The *Gott* definition of *in loco parentis* was qualified with an "unless against public policy" stipulation. Until recently courts felt that damage awards against colleges and universities drained the financial resources of such institutions and that such a drain was against public policy. Thus, the shortage of old cases discussing *in loco parentis* as a basis of liability comes as no surprise. This issue was never reached by most appellate courts because of the preemptory immunity issue. *Id.* (footnotes and citations omitted).

The immunity doctrines mentioned by Szablewicz and Gibbs limit judgments against certain institutions. Such doctrines vary between states. Sovereign immunity doctrines often protect state institutions, while charitable immunity doctrines often protect private institutions. Most jurisdictions, however, now limit such immunities. *See* generally Janet Fairchild, *Annotation, Tort Immunity of NonGovernmental Charities -- Modern Status*, 25 A.L.R.4th 517 (1983); Allen E. Korpela, *Annotation, Modern Status of Doctrine of Sovereign Immunity as Applied to Public Schools and Institutions of Higher Learning*, 33 A.L.R.3d 703 (1970) (citing sovereign immunity doctrines).

[33] Jackson, *supra* note 6, at 1141-42.

Student protest during the 1960s ended traditional *in loco parentis*.[38] Students demanded additional freedoms and rights.[39] The courts responded by refusing to grant deference to unconstitutional university rules.[40] Courts and commentators soon concluded that *in loco parentis* no longer characterized the student-college relationship.[41] In 1971, Congress enacted the Twenty-sixth Amendment, which lowered the voting age to eighteen.[42] This appeared to reflect a societal view that college-aged students should be treated as adults.[43]

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[34] *Id.* German higher education had its debut in the United States in 1876 when Johns Hopkins University was founded. According to Jackson, the students at Johns Hopkins "were remarkably free of paternalistic control, the curriculum was mostly elective, and students generally were unsupervised." *Id.* at 1142. The University of Chicago, founded in 1889, was another major institution to follow the German model. *Id.* at 1142 n.46. German education envisioned the large "university," whereas the English model embraced the smaller "college" setting. *Id.* at 1140-42.

[35] *Id.* at 1142.

[36] Kaplin, *supra* note 9, at 6. In 1940, there were approximately 1.5 million degree students in institutions of higher education in the United States. This number increased to 2.5 million in 1955, a 66% increase. By 1965, more than 5.5 million students were enrolled. *Id.*

[37] *See Id.* (noting the increase in college students in the 1960s as a result of the baby boom).

[38] *See* generally Jackson, *supra* note 6, at 1143; Stamatakos, *supra* note 9, at 474-76.

[39] Jackson, *supra* note 6, at 1143.

[40] Students' disobedience led to confrontations with university officials. See Szablewicz & Gibbs, *supra* note 10, at 456. One clash occurred at the University of California when the administration tried to stop students from political protest on campus. Jackson, *supra* note 6, at 1143. As a result, students who had worked during previous summers for the civil rights cause organized the "Free Speech Movement." *Id.* at 1143 & n.55. According to Jackson, the civil rights activists had "returned to campus unwilling to accept restrictions on their own political rights." *Id.* at 1143 n.55. See generally Donald A. Reidhaar, *The Assault on the Citadel: Reflections on a Quarter Century of Change In the Relationships Between the Student and the University*, 12 J.C. & U.L. 343, 347 (1985) (discussing origins of student protests during the 1960s); Michael Clay Smith, *Coping with Crime on Campus* 8- 9 (1988) ("By the late 1960s, thousands of criminal cases were in the courts growing out of 'sit-ins' and other sorts of student demonstrations in support of political ideology.") (footnote omitted).

### C. The Student-College Contractual Relationship

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The Fifth Circuit, in *Dixon v. Alabama State Bd. of Ed.*, 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961), provided a turning point in the rejection of *in loco parentis*. The Dixon court explicitly rejected traditional deference to the university and held that state-run institutions could not expel students without a hearing. *Id.* at 158. In *Dixon*, a state university had expelled two students because they had participated in civil rights demonstrations. *Id.* at 151, 152 n.3. The court rejected the contention that a public school could rely on traditional deference to the college, and found that the school's policies violated the students' due process rights. *Id.* at 157-58. *See* generally William W. Van Alstyne, *The Tentative Emergence of Student Power in the United States*, 17 Am. J. Comp. L. 403, 412 (1969) (referring to *Dixon* as "[t]he watershed decision" in the demise of *in loco parentis*). Other courts have solved student-college disputes by analyzing the constitutional rights of the student. This method of analysis is limited, however, because it only applies to public colleges, and is generally not relevant to determining a duty relationship. *See* H.L. Silets, *Of Students' Rights and Honor: The Application of the Fourteenth Amendment's Due Process Strictures to Honor Code Proceedings at Private Colleges and Universities*, 64 Denv. U. L. Rev. 46 (1987); Stamatakos, *supra* note 9, at 476 n.23.

[41] *See*, e.g., *Buttny v. Smiley*, 281 F. Supp. 280, 286 (D. Colo. 1968) (stating that *in loco parentis* is "no longer tenable"); *Hegel v. Langsam*, 273 N.E.2d 351, 352 (Ohio Ct. App. 1971) (holding that the university is "neither a nursery school, a boarding school nor a prison.... [Students] must be presumed to have sufficient maturity to conduct their own personal affairs."). Commentators have also almost uniformly proclaimed the *in loco parentis* relationship defunct. *See*, e.g., Perry A. Zirkel & Henry F. Reichner, *Is the In Loco Parentis Doctrine Dead?*, 15 J.L. & Educ. 271, 281-82 (1986) (noting that *in loco parentis*, in the college context, "has undergone a clear rise and a complete demise" in American courts).

[42] U.S. Const. amend. XXVI.

[43] *See*, e.g., *Bradshaw v. Rawlings*, 612 F.2d 135, 140 (3d Cir. 1979) (citing the 26th Amendment as evidence that society considers college-aged students to be adults), cert. denied, 446 U.S. 909 (1980). The enactment of the Twenty-sixth Amendment prompted Justice Douglas to proclaim that, "Students-who, by reason of the Twenty-sixth Amendment, become eligible to vote when 18 years of age-are adults who are members of the college or university community." *Healy v. James*, 408 U.S. 169, 197 (1972) (Douglas, J., concurring).

Courts also use contract principles to examine the student-college relationship.[44] Courts have found representations made by colleges concerning conduct, academics, and discipline enforceable because of implicit contractual agreements.[45] Implied contracts can arise from representations in catalogues, bulletins, housing contracts, registration materials, and admission applications.[46] Courts reason that these representations are part of the bargain between the parties.[47]

The application of contract principles in this context, however, suffers from analytical flaws.[48] Professor Virginia Dodd suggested that such contracts do not result from a true bargain.[49] Dodd argued that materials such as catalogues and bulletins are not drafted to be contracts.[50] Such representations are vague and easily changed.[51]

## II. THE GENERAL RULE: THE LIMITED DUTY OF THE COLLEGE

Since the demise of *in loco parentis*, most courts have refused to hold the college responsible for protecting students,[52] generally on the grounds that no *in loco parentis* relationship exists.[53] In *Hegel v. Langsam*,[54] a case decided soon after the demise of *in loco*

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[44] For a discussion of the application of contract law to the university- student relationship, see Jonathan F. Buchter, *Note, Contract Law and the Student-University Relationship*, 48 Ind. L.J. 253 (1973).

[45] *See Id.* at 256-57 nn. 17-21 (citing cases employing contractual principles to settle disputes).

[46] For cases in which various documents and communications have given rise to an implied contract, *see Id.* at 256-57 nn. 17-21.

[47] *See*, e.g., *Mullins v. Pine Manor College*, 449 N.E.2d 331, 336 (Mass. 1983) ("students are charged, either through their tuition or a dormitory fee, for [protection from criminal acts]. Adequate security is as an indispensable part of the bundle of services which colleges ... afford their students.").

[48] *See* Virginia J. Dodd, *The Non-Contractual Nature of the Student -University Contractual Relationship*, 33 Kan. L. Rev. 701 (1985).

[49] *Id.* at 704.

[50] *Id.* at 714.

[51] *Id.* at 715, 728-729.

[52] *See* generally *infra* notes 54-100. No court, however, has held that colleges cannot owe any duty towards their students. Because students are typically business invitees, universities have a duty to protect students against certain physical hazards on campus. For example, in

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*Shannon v. Washington Univ.*, 575 S.W.2d 235 (Mo. Ct. App. 1978), the plaintiff sued the university after slipping on an icy walkway on campus. *Id.* at 236-37. The court, accepting the student as an invitee, acknowledged that a private university had a duty to exercise ordinary care to keep those areas intended for the use of the invitee in a reasonably safe condition. *Id.* at 237. *See* Keeton, *supra* note 17, §§ 60-64, at 412-50.

While some states have eliminated such distinctions, most jurisdictions classify those who enter upon land into three categories: trespassers, licensees, and invitees. *Id.* § 58, at 393. Further, the law has subdivided these categories. *Id.* A trespasser enters the land without privilege of consent. *Id.* A licensee can be described as someone who has entered the land with consent, but for his own purpose, and not for the purpose or interest of the landholder. *Id.* § 60, at 412. Traveling salesmen who come unsolicited to the door of the landholder and social guests are licensees. *Id.* § 60, at 413. Invitees generally include those consensually allowed on the premises for business that concerns the occupier, and upon the express or implied invitation of the occupier. *Id.* § 61, at 419.

The *Restatement (Second) of Torts* lists the generic landowner/invitee relationship as a special relationship. *Restatement (Second) of Torts* § 314A(3) (1965). Specifically, in § 344, the *Restatement* says:

> Business Premises Open to Public: Acts of Third Persons or Animals: A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land from such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it. *Id.* § 344.

[53] Plaintiffs who allege that the college has a duty to exercise reasonable care to protect students from various safety risks often allege an *in loco parentis* relationship as a basis for such a duty. Such a relationship has been analogized to § 314A(4) of the Restatement (Second) of Torts, which states:

> Special Relations Giving Rise to Duty to Aid or Protect:
> .... (4) One ... who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a ... duty to the other. *Id.* § 314A(4).

Similarly, *in loco parentis* has been analogized to § 320 of the Restatement, which states:

*parentis*, an Ohio court refused to hold the college to a duty to monitor the non-academic activities of its students.[55] In *Hegel*, the plaintiffs, the parents of a delinquent female student, claimed that the university administration negligently allowed their daughter to become involved in an unacceptable lifestyle.[56] In dismissing the case, the court held that society presumed university students mature and capable of supervising their own affairs.[57]

In 1979, in *Bradshaw v. Rawlings*,[58] the Third Circuit Court of Appeals held that the

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> Duty of Person Having Custody of Another to Control Conduct of Third Persons: One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor (a) knows or has reason to know that he has the ability to control the conduct of the third persons, and (b) knows or should know of the necessity and opportunity for exercising such control. *Id.* § 320.

Thus, the college would have a duty to supervise the entire student body to protect its students. Similarly, an *in loco parentis* relationship could be analogized to § 316 of the Restatement. Section 316 states:

> Duty of Parent to Control Conduct of Child: A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such control. *Id.* § 316.

[54] 273 N.E.2d 351 (Ohio Ct. App. 1971).

[55] *Id.* at 352.

[56] *Id.* According to the plaintiffs, the college allowed the student to "become associated with criminals, to be seduced, to become a drug user and further allowed her to be absent from her dormitory and failed to return her to her parents' custody on demand." *Id.*

[57] *Id.* The court stated that "[w]e know of no requirement of the law ... placing on a university or its employees any duty to regulate he private lives of their students, to control their comings and goings and to supervise their associations." *Id.*

[58] 612 F.2d 135 (3d Cir. 1979), *cert. denied*, 446 U.S. 909 (1980).

demise of *in loco parentis* drastically limited the colleges duty to protect its students.[59] Bradshaw, a student, sued his college after receiving injuries in an automobile accident.[60] The plaintiff was a passenger in an automobile being driven back to campus by a fellow student.[61] The driver had become intoxicated at an off-campus school picnic.[62] A jury found the university negligent in its planning and supervision of the event.[63] The college appealed, alleging that it had no duty to supervise the driver or the activities at the picnic.[64]

The Third Circuit reversed.[65] The court reasoned that "the modern American college is not an insurer of the safety of its students."[66] The court noted that college students demanded freedom from oppressive rules in the 1960s.[67] As a result, society now accorded broad responsibilities to college students.[68]

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[59] *Id.* at 139-40. For student commentary on, compare Rita Mankovich Irani, *Recent Decisions, Torts - Negligent Supervision - College Liability - Student Intoxication Injury*, 19 Duq. L. Rev. 381 (1981) (approving of the decision), with *Note, The Student-College Relationship and the Duty of Care: Bradshaw v. Rawlings*, 14 Ga. L. Rev. 843 (1980) (criticizing the opinion as allowing too broad of a liability shield for universities).

[60] Bradshaw was paralyzed after an automobile in which he was a passenger struck a parked car. The driver of the automobile was speeding. The driver attempted to negotiate a road filled with drainage dips used to carry surface runoff. *Bradshaw*, 612 F.2d at 137. The accident rendered Bradshaw a quadriplegic. *Id.*

[61] *Id.*

[62] *Id.* A faculty member had participated in the planning of the event and had co-signed a check used to purchase alcohol. The planners of the event publicized the event throughout campus. Flyers "were mimeographed by the college duplicating facility and featured drawings of beer mugs." No faculty members, however, attended the picnic. *Id.*

[63] *Id.* The jury ordered the university to pay the plaintiffs $1,108,067. *Id.*

[64] *Id.*

[65] *Bradshaw*, 612 F.2d at 142-43.

[66] *Id.* at 138.

[67] *Id.* at 139. The court noted that, "A dramatic reapportionment of responsibilities and social interests of general security took place [with the demise of *in loco parentis*]. Regulation by the college of student life on and off campus has become limited.... [T]oday students vigorously claim the right to define and regulate their own lives." *Id.* at 139-40.

[68] *Id.* at 138-39. The court, exercising diversity jurisdiction and applying Pennsylvania law, examined the rights that Pennsylvania afforded to college age students:

The court also refused to find that university regulations banning alcohol use created an ensuing obligation of enforcement.[69] The court reasoned that this regulation mirrored the state drinking age law, and was not an enforceable agreement.[70] The college could not reasonably have expected the plaintiff to rely on the alcohol ban for his protection.[71]

Moreover, the court found that the college, through failing to monitor the drinking, did not create a known probability of harm giving rise to a duty.[72] The court reasoned that student alcohol consumption was relatively harmless.[73] The court pointed to the lack of any ban on printed and broadcasted beer advertisements, and even seemed to invoke personal experience.[74] Moreover, the court held that supervisory obligations would create impossible burdens.[75]

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> College students today are no longer minors; they are now regarded as adults in almost every phase of community life ... [t]hey may vote, marry, make a will, qualify as a personal representative, serve as a guardian of the estate of a minor, wager at racetracks, register as a public accountant, practice veterinary medicine, qualify as a practical nurse, drive trucks, ambulances and other official fire vehicles, perform general fire fighting duties, and qualify as a private detective. *Id.* at 139 (footnotes omitted).

[69] *Id.* at 141. The regulation stated: "Possession or consumption of alcohol or malt beverages on the property of the College or at any College sponsored or related affair off campus will result in disciplinary action." *Id.*

[70] *Bradshaw*, 612 F.2d at 141.

[71] *Id.* The court applied § 320 of the *Restatement*. *Id.* at 141. *See supra* note 53 for the text of § 320.

[72] *Bradshaw*, 612 F.2d at 141. The court reasoned in part that because Pennsylvania law did not recognize social host liability, it could not hold the college to such a duty. *Id.*

[73] *Id.* at 142. According to the court, "it cannot be seriously controverted that a goodly number of citizens indulge in this activity." *Id.*

[74] *Id.* The court stated that "this panel of judges is able to bear witness to the fact that beer drinking by college students is a common experience." *Id.*

[75] *Id.* at 142. The court referred to such an obligation as an "impossible burden." *Id.* In discussing the difficulty with enforcing such regulations, the court noted that New Jersey, a bordering state, had a lower drinking age, thus making alcohol an easy commodity for the underage drinkers at the college to obtain. *Id.*

Most courts after Bradshaw refused to hold colleges to a duty to protect students.[76]

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[76] *See Albano v. Colby College*, 822 F. Supp. 840, 841 (D. Maine 1993) (finding no duty to prevent adult college student from becoming intoxicated on school-sponsored field trip); *Booker v. Lehigh Univ.*, 800 F. Supp. 234, 241 (E.D. Pa. 1992) (finding no duty to monitor student drinking at fraternity house), aff'd mem., 995 F.2d 215 (3d Cir. 1993); *Hartman v. Bethany College*, 778 F. Supp. 286, 291-95 (N.D. W. Va. 1991) (holding that school had no duty to supervise and take action to prevent underage plaintiff from attempting to patronize off-campus bars); *Tanja H. v. Regents of the Univ. of Cal.*, 278 Cal. Rptr. 918, 920-21 (Ct. App. 1991) (noting several policy reasons not to find that university had a duty to safeguard its students); *Baldwin v. Zoradi*, 176 Cal. Rptr. 809, 813-21 (Ct. App. 1981) (finding no duty to take action to control dormitory drinking); *University of Denver v. Whitlock*, 744 P.2d 54, 56-62 (Colo. 1987) (en banc) (finding no duty on part of college as either arising from custodial position towards students, or as landlord to fraternity house, to supervise potentially dangerous activity on trampoline located at fraternity house); *Savannah College of Art & Design v. Roe*, 409 S.E.2d 848, 849-50 (holding that dormitory lease agreement did not give rise to a special protective relationship); *Walker v. Daniels*, 407 S.E.2d 70, 75 (Ga. 1991) (finding no duty to have provided lifeguard where students were engaging in unauthorized use of campus pool); *Leonardi v. Bradley Univ.*, 625 N.E.2d 431, 435-36 (Ill. App. Ct. 1993) (finding no duty to protect student against rape by fellow student occurring in on-campus fraternity house), appeal denied, 155 Ill. 2d 565 (1994); *Rabel v. Illinois Wesleyan Univ.*, 514 N.E.2d 552, 560-61 (Ill. App. Ct. 1987) (finding no protective relationship to control intoxication of fraternity members despite assertions in school bulletins concerning religious tenants and alcohol policies of the school), cert. denied, 520 N.E.2d 392 (1988); *Klobuchar v. Purdue Univ.*, 553 N.E.2d 169, 172 (Ind. Ct. App. 1990) (finding no duty to protect student from the criminal acts of her husband); *Swanson v. Wabash College*, 504 N.E.2d 327, 329-31 (Ind. Ct. App. 1987); (finding no duty to supervise off-campus recreational baseball games); *Campbell v. Board of Trustees*, 495 N.E.2d 227, 232-33 (Ind. Ct. App. 1986) (finding no duty to take measures to prevent student drinking and driving); *Fox v. Louisiana St. Univ.*, 576 So. 2d 978, 983 (La. 1991) (finding no duty to supervise rugby game and preceding alcohol consumption); *Eiseman v. New York*, 511 N.E.2d 1128, 1136 (N.Y. 1987) (holding that college had no duty to monitor ex-convict student enrolled under state program to educate the disadvantaged); *Alumni Association v. Sullivan*, 572 A.2d 1209, 1213 (Pa. 1990) (finding no duty to take measures to prevent intoxication of youth who committed arson while under the influence); *Millard v. Osborne*, 611 A.2d 715, 720-21 (Pa. Super. Ct.) (finding no duty to monitor drinking and driving), cert. denied, 615 A.2d 1312 (1992); *Beach v. University of Utah*, 726 P.2d 413 (Utah 1986) (holding that college had no duty to monitor student's drinking on school sponsored biology field trip); *Smith v. Day*, 538 A.2d 157, 159-60 (Vt. 1987) (finding no duty to take measures to prevent accidental shooting death). *See* also Michael R. Flaherty, *Annotation, Tort Liability of College or University for Injury Suffered by Student as a Result of Own or Fellow Student's Intoxication*, 62 A.L.R. 4th 81,

In *Baldwin v. Zoradi,*[77] a California appellate court refused to regard alcohol use by college students as so morally wrong that it justified extra efforts for prevention.[78] The court stated that decreased supervision allowed students to "grow into responsible adulthood."[79] Similarly, in *Beach v. University of Utah,*[80] the Utah Supreme Court refused to find a duty to supervise and protect the student, reasoning that the university's purpose was to educate, not to "baby sit," and that such obligations would divert resources from education and create a repressive environment.[81] In *Rabel v. Illinois Wesleyan University,*[82] the court rejected plaintiff's claim that the college, in representing itself as a "strong disciplined" and "religious" institution, assumed a duty to supervise or prevent student activities inconsistent with such precepts.[83] The court then held that such obligations would cause administrative problems and divert resources away from education.[84] In *University of Denver v. Whitlock,*[85] the Colorado Supreme Court recognized the serious risks accompanying student alcohol use,

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83 (1988) (noting that "courts often reason that college administrators and faculties do not assume a role in loco parentis, because college students are adults and not children of tender years").

[77] 176 Cal. Rptr. 809 (1981).

[78] *Id.* at 817. In *Baldwin*, the plaintiff received serious injuries after the car in which she was a passenger crashed. The car had been involved in a drag race. The drivers of the vehicles involved in the accident had previously been drinking in the school dormitories. *Id.* at 811-12.

[79] *Id.* at 818.

[80] 726 P.2d 413 (Utah 1986).

[81] *Id.* at 418-19. In *Beach*, the plaintiff student had become intoxicated during a biology field trip. While she was intoxicated, the plaintiff fell off of a cliff and received serious injuries. *Id.* at 415.

[82] 514 N.E.2d 552 (Ill. App. Ct. 1987), *cert. denied*, 520 N.E.2d 392 (1988).

[83] *Id.* at 558. Moreover, the court refused to find a special relationship based upon the parties' landlord-tenant relationship. *Id.* at 562. The court reasoned that Illinois law did not recognize the landlord-tenant relationship as giving rise to a duty to control the intentional criminal acts of third parties. *Id.* In *Rabel*, the plaintiff received injuries after she had been dropped by an intoxicated student engaging in a fraternity prank. *Id.* at 554.

[84] *Id.* at 558-61.

[85] 744 P.2d 54 (Colo. 1987) (*en banc*).

but refused to find a special relationship that could warrant a duty.[86] The court reasoned that the school's efforts to ensure student safety were too minimal to create a dependent relationship, and that custodial obligations would directly conflict with student autonomy and independence.[87] In *Alumni Association v. Sullivan*,[88] the Supreme Court of Pennsylvania refused to hold a college to a duty to control the conduct and alcohol consumption of a student who had set a fraternity house ablaze.[89] The court reasoned that this would force upon a university an *in loco parentis* relationship that would be "inappropriate" in modern times.[90]

Courts have relied on *Bradshaw* when addressing the duty of a college to protect students against crime.[91] For example, in *Tanja H. v. Regents of the University of California*,[92] a California court held that the university had no duty to protect a student against being gang raped by fellow students in an on-campus dormitory.[93] The court conceded that the incident may have been foreseeable.[94] It recognized that students, due to their youth, were often unaware of the dangers that alcohol posed and the risk of violence.[95] Moreover, the court recognized that gang rape and acquaintance rape on campus were widespread and "heinous."[96] Nevertheless, the court refused to find such risks unreasonable because custodial responsibilities would place extensive burdens on both students and colleges, burdens that would outweigh the utility of preventing future attacks.[97] In *Hartman v. Bethany College*,[98] a federal district court refused to find a duty to protect the student from a sexual assault that had occurred off-campus.[99] The court found that it would be too burdensome to hold a college responsible for monitoring the off-campus activities of their students.[100]

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[86] *Id.* at 61. Whitlock received injuries while attempting to complete a flip on a trampoline in front of his fraternity house. He landed on the back of his head, breaking his neck. *Id.* at 56.

[87] *Id.* at 62. The court also rejected the plaintiff's argument that provisions in the lease executed between the student and university gave rise to an obligation to monitor the fraternity house. *Id.* at 61-62.

[88] 572 A.2d 1209 (Pa. 1990).

[89] *Id.* at 1209-10.

[90] *Id.* at 1213.

[91] *See Hartman v. Bethany College*, 778 F. Supp. 286, 291-95 (N.D. W. Va. 1991); *Tanja H. v. Regents of the Univ. of Cal.*, 278 Cal. Rptr. 918, 920-21 (Cal. Ct. App. 1991).

[92] 278 Cal. Rptr. 918 (Cal. Ct. App. 1991).

[93] *Id.* at 919.

[94] *Id.* at 921.

[95] *Id.* at 920.

[96] *Id.* at 921. In his concurrence, Justice Kline took issue with the majority's suggestion that the concentration of young women on campus somehow contributed to the problem of sexual

## III. REVERSAL OF THE TREND: THE 1980S AND THE DUTY TO PROTECT AGAINST ON-CAMPUS ATTACKS

### A. Duty based on the College's Position as Landholder or Landlord

Faced with the problem of rape and sexual assault on campus, some courts in the 1980s ignored the *Bradshaw* reasoning and found a duty to protect based on premises liability principles.[101] In *Relyea v. State*,[102] the plaintiffs sued the university after two female students were abducted from an unguarded parking lot and murdered, and claimed that the

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assault. Justice Kline blamed the large number of campus rapes to the victimization rate for women throughout society that is highest at the age during which most women go to college. Thus, the college could not be considered as having placed the student in any additional danger and a duty to protect was not warranted. *Id.* at 923-26 (Kline, J., concurring).

[97] *Tanja H.*, 278 Cal. Rptr. at 921-22.

[98] 778 F. Supp. 286 (N.D. W. Va. 1991).

[99] The plaintiff was assaulted by two non-students whom she met while socializing at an off-campus establishment named "Bubba's Bison Inn." *Id.* at 289.

[100] *Id.* at 292-93.

[101] *See Peterson v. San Francisco Community College Dist.*, 685 P.2d 1193, 1201-02 (Cal. 1984) (finding duty to exercise care to ensure a campus safe from criminal attack); *Relyea v. State*, 385 So. 2d 1378, 1383-84 (Fla. Dist. Ct. App. 1980) (stating in dictum that college could have an obligation to take security measures if criminal acts had been foreseeable); *Miller v. State*, 467 N.E.2d 493, 497 (N.Y. 1984) (finding duty to provide adequate security in dormitories); *Brown v. North Carolina Wesleyan College*, 309 S.E.2d 701, 703 (N.C. Ct. App. 1983) (recognizing in dictum possible existence of a duty). *See* generally Sharlene A. McEvoy, *Campus Insecurity: Duty, Foreseeability, and Third Party Liability*, 21 J.L. & Educ. 137 (1993) (discussing extent of university liability for campus crime).

[102] 385 So. 2d 1378 (Fla. Dist. Ct. App. 1980).

institution had breached a duty to provide adequate security.[103] The court reasoned that a duty to protect could arise from the parties' relationship as landowner and invitee.[104] However, for a duty to attach, the criminal acts had to have been reasonably foreseeable. According to the court, this finding hinged on actual or constructive knowledge of prior, similar crimes.[105]

In *Miller v. State*,[106] the New York Court of Appeals recognized that the university's position as landlord to dormitory residents could support a duty to protect students against foreseeable criminal attacks.[107] However, as many states have not recognized the landlord's general duty to protect against foreseeable crime, this argument has met limited acceptance.[108]

When courts base liability on the landholder/invitee or landlord/tenant relationships the main issue is the foreseeability of the crime.[109] As in *Relyea*, courts often hinge foreseeability on the finding of prior, similar crimes.[110] Congress aided plaintiffs by passing the Student Right- to-Know and Campus Security Act in 1990.[111] The Act requires the college, as a condition to receiving federal funds, to release extensive information about the amounts and types of crimes that have occurred on its campus.[112] Commentators have suggested that this Act will help plaintiffs show the foreseeability of the particular crimes of which they were victims.[113]

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[103] *Id.* at 1380. The building in which the university held the class was located "in a remote, outlying area on the northeast corner of the campus, approximately three quarters of a mile from the main complex of buildings." *Id.*

[104] *Id.* at 1383.

[105] *Id.* The court found that the college had no such knowledge, and found no duty. The only crimes the university had previously encountered were minor transgressions. *Id.*

[106] 467 N.E.2d 493, 497 (N.Y. 1984).

[107] *Id.* at 497. *See* also *Nero v. Kansas State Univ.*, 861 P.2d 768 (Kan. 1993) (recognizing that landlord/tenant relationship arising from dormitory housing could constitute special relationship).

[108] *See* McEvoy, *supra* note 101, at 145-46 (noting that "state courts are split on the extent to which the university as a landlord has a duty to protect students who live in its residence halls"). The duty of a landlord to protect tenants against criminal attack or theft is a recent judicial invention. *See* Keeton, *supra* note 17, at 442. In *Kline v. Massachusetts Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970), a court first imposed a duty on the landlord of an urban apartment building to protect the tenants of the building from foreseeable criminal assaults. *Id.* at 485. Not all states accept this duty, but it is gaining increased recognition. Keeton, *supra* note 17, at 442; *see* also Irma W. Merrill, *Note, Landlord Liability for Crimes Committed by Third Parties Against Tenants on the Premises*, 38 Vand. L. Rev. 431, 432 (1985).

[109] *See* McEvoy, *supra* note 101, at 139-43.

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[110] *See*, e.g., *Peterson v. San Francisco Community College Dist.*, 685 P.2d 1193, 1201-02 (Cal. 1984) (finding duty to exercise care to ensure a safe campus based on knowledge of prior criminal attacks); *Savannah College of Art & Design v. Roe*, 409 S.E.2d 848, 850 (Ga. 1991) (recognizing possible existence of duty but finding no evidence of prior similar attacks). *See* generally Michael C. Griffaton, *Note, Forewarned is Forearmed: The Crime Awareness and Campus Security Act of 1990 and the Future of Institutional Liability for Student Victimization*, 43 Case W. Res. L. Rev. 525, 581 (1993) (noting that foreseeability typically hinges on finding of prior similar acts).

[111] Pub. L. No. 101-542, 104 Stat. 2381 (1990) (codified as amended at 20 U.S.C. § 1092(f) (Supp. IV 1992)).

[112] 20 U.S.C. § 1092(f) (Supp. IV 1992). The Act requires colleges to certify that they have established a security policy on campus. Specifically, the Act requires the college to disclose:

(A) A statement of current campus policies regarding procedures and facilities for students and others to report criminal actions or other emergencies occurring on campus and policies concerning the institution's response to such reports.

(B) A statement of current policies concerning security and access to campus facilities, including campus residences, and security considerations used in the maintenance of campus facilities.

....

(F) Statistics concerning the occurrence on campus, during the most recent calendar year, and during the 2 preceding calendar years for which data are available, of the following criminal offenses reported to campus security authorities or local police agencies -

    (i) murder;
    (ii) sex offenses, forcible or non-forcible;
    (iii) robbery;
    (iv) aggravated assault;
    (v) burglary; and
    (vi) motor vehicle theft.

....

(H) Statistics concerning the number of arrests for the following crimes occurring on campus:

    (i) liquor law violations;
    (ii) drug abuse violations; and
    (iii) weapons possessions.

## B. Duty to Protect Based on Policy Factors

In *Mullins v. Pine Manor College*,[114] the Massachusetts Supreme Judicial Court justified finding a duty to protect largely on policy factors that conflicted with the *Bradshaw* reasoning.[115] The plaintiff, a resident student at an all women's college near Boston, was raped by an intruder who broke into her dormitory.[116] The court first determined that a duty to protect the student arose from the expectations of society, parents, and students.[117] According to the court, the community still expected universities to take security measures for their students, despite the demise of *in loco parentis*.[118] The court pointed to factors that made it difficult for students to protect themselves.[119] The court emphasized that students

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*Id.*

[113] *See* McEvoy, *supra* note 101, at 151. But *see* Griffaton, *supra* note 110, at 579 (noting that the Campus Crime Act will create questions regarding the value of statistics in determining foreseeability).

[114] 449 N.E.2d 331 (Mass. 1983).

[115] *See supra* notes 58-75 and accompanying text for a discussion of the *Bradshaw* policy reasoning.

[116] *Mullins*, 449 N.E.2d at 334. Mullins locked her door to her dormitory room when she went to sleep. The intruder entered her room, awakened her, and took her out of the building into a courtyard outside the dormitory. The intruder brought Mullins out of the courtyard through a gate, which was chained, but not tightly secured. The intruder then led Mullins into a campus building which remained unlocked, whereupon he raped her. The entire incident lasted 60 to 90 minutes, and the plaintiff and intruder were outside campus buildings for at least 20 minutes. At no time did security intervene to assist the plaintiff. *Id.*

[117] *Id.* at 335 (citing *Schofield v. Merril*, 435 N.E.2d 339 (Mass. 1982) (noting that duty finds its "source in existing social values and customs")).

[118] *Id.* at 335-36. The court determined that the demise of *in loco parentis* did not mean it had no responsibility to provide a safe campus, noting "[t]he fact that a college need not police the morals of its resident students, however, does not entitle it to abandon any effort to ensure their physical safety." *Id.*

[119] *Id.* at 335. The court noted that students could not establish a system for the announcement of authorized visitors in the dormitories, and pointed to university regulations that actually made it a violation to take individual security measures such as installing a

need protection because of their inexperience.[120] Moreover, only the school could provide this safety.[121]

The court also found that the college voluntarily assumed a duty to protect its students.[122] The court found that physical manifestations of security, such as the fence that ran around the campus, implied that the college promised a secure campus.[123] Parents and potential students relied upon these representations in choosing to go to the college, and later relied upon them for their security.[124] The court found that adequate security constituted an "indispensable" service that colleges provided to their students.[125] Finally, the court held that the crimes that had occurred were foreseeable to the college.[126] The court did not require

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second lock on a dormitory room door. The court also noted that the concentration of young women made this particular campus a target. *Id.*

[120] *Id.* The court cited the testimony of one expert witness who referred to students as "young people who are legally adults and have not understood really what adulthood perhaps means." *Id.* at 335 n.7.

[121] *Mullins*, 449 N.E.2d at 335. The court stated "[t]hus, the college must take the responsibility on itself if anything is to be done at all." *Id.*

[122] *Id.* at 336. The court relied on § 323 of the *Restatement (Second) of Torts*, which states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking. *Restatement (Second) of Torts* § 323 (1965).

[123] *Mullins*, 449 N.E.2d at 336. ("[P]rospective students ... are certain to note the presence of a fence around the campus, the existence of security guards, and any other visible steps taken to ensure the safety of students.").

[124] *Id.* at 336-37.

[125] *Id.* at 336. The court stated, "[W]hen students are considering enrolling in a particular college, they are likely to weigh a number of factors. But a threshold matter is whether the college has undertaken to provide an adequate level of security." *Id.*

[126] *Id.* at 337. The court noted testimony of school officials who had warned students about the dangers of living in close proximity of an urban area. *Id.*

findings of prior similar criminal acts.[127]

## IV. THE NINETIES: PROTECTION THROUGH SUPERVISION OF STUDENTS

The decisions during the 1980s holding colleges responsible for providing security prompted commentators to debate whether *in loco parentis* was making a return in the area of tort liability.[128] Decisions during the 1990s have expanded the colleges' duties beyond merely providing adequate security. In many cases, these decisions have held the college to a duty to protect that requires the college to exercise a uniquely parental role. Courts are holding colleges responsible for monitoring the activities of students, and to educate and warn students about dangers on campus. Basically, courts are holding colleges responsible for keeping their students out of trouble. A general duty to supervise is emerging. This section highlights different types of injuries and risks in which the duty to supervise is emerging.

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[127] *Mullins*, 449 N.E.2d at 337 & n.12.

[128] In their 1987 article, James Szablewicz and Annette Gibbs noted that "a new *in loco parentis* relationship is developing. Students are demanding it." Szablewicz & Gibbs, *supra* note 10, at 454. The authors reasoned that new attitudes in the 1980s created this trend. "Students began to expect their colleges to get them jobs, provide them with tuition assistance and establish their careers." *Id.* at 453. The authors suggested that the increase in lawsuits against universities is a manifestation of students' desires to receive university protection. *Id.* at 457. The authors pointed to four cases as evidence of their thesis: *Peterson v. San Francisco College*, 685 P.2d 1193, 1198 (Cal. 1984) (finding duty based on college's obligation to provide safe premises); *Whitlock v. University of Denver*, 712 P.2d 1072, 1075-76 (Colo. Ct. App. 1985) (finding duty to provide safe premises where student received injuries while jumping on trampoline), rev'd, 744 P.2d 54 (Colo. 1987) (en banc); *Relyea v. State*, 385 So. 2d 1378, 1382 (Fla. Dist. Ct. App. 1980) (noting possibility that college could have a duty to provide security, but declining to impose such duty absent a history of violent attacks in area); *Mullins v. Pine Manor College*, 449 N.E.2d 331, 336 (Mass. 1983) (holding college to a duty to provide security against foreseeable criminal actions). Szablewicz & Gibbs, *supra* note 10, at 458-61. Szablewicz and Gibbs, after discussing the intermediate court's decision in *Whitlock*, acknowledged that the Supreme Court of Colorado had recently reversed the decision. *Id.* at 460. Nevertheless, they asserted that the case evidences a return to the *in loco parentis* doctrine because a jury and appellate court imposed liability upon a university. *Id.* at 460-61.

The Szablewicz and Gibbs theory drew harsh criticism from Theodore Stamatakos. Stamatakos, in his 1991 article, vigorously rejected Szablewicz and Gibbs' argument that the *in loco parentis* doctrine is making a comeback. Stamatakos first rejected the contention that *in loco parentis* once provided a basis for tort liability. Stamatakos, *supra* note 9, at 482-84. Stamatakos asserted that recent cases to which Szablewicz and Gibbs cite represent ordinary applications of tort principles, and do not evince a repudiation of the *Bradshaw* policy rationale. *Id.* at 484-87. Stamatakos blamed the rise in tort claims against the university as a general manifestation of the litigation explosion of the 1980s, or as "a recognition by attorneys that college coffers are among the deepest of the much sought-after 'deep pockets.'" *Id.*

### A. Supervision of Dangerous Hazing Activities

In *Furek v. University of Delaware*,[129] the Delaware Supreme Court found that the university owed a duty to control the hazing activities of an on-campus fraternity.[130] Hazing was against university rules, and the university had on several occasions expressed its concern that students abide by this rule.[131] The plaintiff, Jeffrey Furek, suffered second-degree burns after a fellow student poured a lye-based oven cleaner over Furek's body during a hazing event that occurred in an on-campus fraternity house.[132] Furek sued, claiming that the university had a responsibility to control the hazing.[133]

The Delaware Supreme Court confronted the *Bradshaw* line of cases and questioned why the student-college relationship should not be a special relationship.[134] The court described several factors showing that the university controlled and guided student life.[135] The university provided security, food, housing, and extracurricular activities.[136] The court questioned the premises underlying the *Bradshaw* line of cases.[137] First, the court questioned whether the lack of supervision furthered the maturation process, noting that *Bradshaw* provided no empirical support for that proposition.[138] The court also questioned whether supervising dangerous activities conflicted with the demise of *in loco parentis*, noting that students who revolted in the 1960s protested political and intellectual coercion rather than basic protective measures.[139] Further, the court noted that the law did not recognize most students as adults for the purpose of alcohol consumption because most students are not legally old enough to consume alcohol.[140] Nevertheless, the court bowed to the "apparent weight" of precedent[141] and refused to hold that the student-college relationship was a special relationship.[142]

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[129] 594 A.2d 506 (Del. 1991).

[130] *Id.* at 522-23.

[131] *Id.* at 510-11. The court noted a university-published guide to student life. *Id.* at 510 n.2. It contained the following statement: "Respect for Dignity and Rights of Other Students is a basic tenet of the academic community. Hazing, the subjection of an individual to any form of humiliating treatment and the violation of the rights of other students, have no place in the University community." *Id.* The guide also advised students that "[t]he University reserves the right to deny registration to student ... activities which expose their members to high bodily risk for which the University might be considered liable." *Id.* The court also pointed to statements that the Dean of Students had published that both recited concern about fraternity hazing and offered help to the fraternity in formulating non-hazing activities. *Id.* at 510. The court noted continued contact between the Dean of Students and the fraternities regarding alleged hazing incidents. *Id.* Also, the school sent fraternities a copy of a speech given on campus by the mother of a hazing victim from another institution. *Id.*

[132] *Id.* at 510. Furek had been a pledge for Sigma Phi Epsilon Fraternity. *Id.* at 509. During the event, Joseph Donchez poured the oven cleaner over the neck, back, and shoulders of Furek, causing second-degree burns and permanent scarring. *Id.* at 510. Furek was blindfolded when this occurred. *Id.*

[133] *Id.* at 511.

[134] *Furek*, 594 A.2d at 517-19.

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[135] *Id.* at 516.

[136] *Id.*

[137] *Id.* at 516-18.

[138] *Id.* at 518 (criticizing *Beach v. University of Utah*, 726 P.2d 413, 419 (Utah 1986)).

[139] *Furek*, 594 A.2d at 518 n.11. In criticizing cases that have relied on the *Bradshaw* reasoning, the court noted that students during the 1960s did not protest against supervision and protection from dangerous activities like excessive drinking and the misuse of a trampoline. *Id.* at 518 n.11 (citing *University of Denver v. Whitlock*, 744 P.2d 55, 56 (Colo. 1987) (en banc)).

[140] *Id.* at 518. The court found significant the fact that since the *Bradshaw* decision in 1979, there had been a national trend in raising the legal drinking age from 18 to 21. *Id.* at 518 n.12.

[141] *Id.* at 519-20. The court also discussed *Mullins* and other decisions suggesting that the generic college-student relationship could give rise to a duty to supervise. *See Id.* at 518-19 (citing *Mullins v. Pine Manor College*, 449 N.E.2d 331 (Mass. 1983); *Rubtchinsky v. State Univ.*, 260 N.Y.S.2d 256 (Ct. Cl. 1965); *Zavala v. Regents of the Univ. of Cal.*, 178 Cal. Rptr. 185 (Cal. Ct. App. 1981)).

[142] *Id.* at 519-20. The court also rejected the argument accepted by the trial court that the university had a duty to supervise students because they were persons having dangerous propensities. *Id.* at 519. The plaintiff based this argument on § 319 of the *Restatement (Second) of Torts*, which states:

> Duty of Those in Charge of Person Having Dangerous Propensities. One who takes charge of a third person whom he knows or should know to be

Although the court did not find a special relationship, the court did find that the university had voluntarily assumed a duty to monitor the fraternity for hazing violations.[143] This duty arose implicitly through the school's repeated written and verbal communications concerning its efforts to eradicate hazing.[144] The court concluded that students could have relied on the university to enforce its own articulated ideals.[145]

The court also found that the student's position as a business invitee [146] gave rise to a special relationship that could support a duty. [147] Although the court acknowledged that the university did not own the fraternity house, a special relationship existed because the

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> likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm. *Restatement (Second) of Torts* § 319 (1965).

The court suggested that this relationship contemplates relationships of much closer control than the university-student relationship. *Furek*, 594 A.2d at 519. The court cited the relationship between a physician at a mental hospital and a patient as an example. The court reasoned that the actions and qualities of fraternity brothers do not conform to this custodial standard. *Id.*

[143] *Id.* at 520.

[144] *Id.* *See supra* note 123 for a discussion of the university's anti-hazing communications.

[145] *Id.* at 520 (citing *Mullins v. Pine Manor College*, 449 N.E.2d 331, 336 (Mass. 1983)).

[146] The court cited §§ 343 and 344 of the *Restatement (Second) of Torts*. Section 343, Dangerous Conditions known to or Discoverable by Possessor, states:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger. *Restatement (Second) of Torts* § 343 (1965). For the text of § 344, *see supra* note 52.

[147] *Furek*, 594 A.2d at 520-22. But *see University of Denver v. Whitlock*, 744 P.2d 54, 61-62 (Colo. 1987) (*en banc*) (rejecting contention that lease provision allowing university to evict upon the discovery of "immoral or unlawful conduct" imposed a duty to direct and control activities within the property); *Rabel v. Illinois Wesleyan Univ.*, 514 N.E.2d 552, 561-62 (Ill. App. Ct. 1987) (rejecting duty based on landlord-tenant relationship), *cert. denied*, 520 N.E.2d 392 (1988).

university owned the land on which the house stood.[148] The court found that the university had a duty arising from this relationship because it could have foreseen the hazing dangers posed by the students, and because the students initiating the hazing were within the university's control.[149] In finding foreseeability, the court noted past hazing incidents at the fraternity house where the incident took place, and the university's general commitment to combat hazing.[150] In finding that the university had control, the court noted, among other factors, that the university police had authority to police the fraternity house because members of the fraternity were still subject to university rules.[151]

### B. Protecting Students from Physical Hazards on Campus

In *Pitre v. Louisiana Tech University*,[152] a Louisiana Appellate Court held the university to a duty to protect the student from his own reckless behavior.[153] The plaintiff, Earl Pitre, suffered injuries while sledding down a hill on campus grounds.[154] Pitre hit a concrete encased light pole in the parking lot located at the bottom of the hill, rendering him a paraplegic.[155] The appellate court found that the university owed the plaintiff a duty to correct or warn of unreasonably dangerous conditions on the campus.[156] The court found that a special relationship arose from the plaintiff's status as a resident student.[157] The court reasoned that the university operated as a custodian of resident students because of its regulation of their lives.[158] This regulation created an ensuing obligation to take steps to protect students from foreseeable harm.[159] The court also held that a special relationship arose from the plaintiff's invitee status.[160] After establishing the existence of a special relationship, the court found that the university had created an unreasonable and foreseeable risk of injury by failing to take steps to prevent sledding at the spot where the injury occurred.[161] The court reasoned that the university had been aware of the dangers at the injury site, but had created an illusion of safety by allowing the sledding to occur.[162]

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[148] *Furek*, 594 A.2d at 522. But *see Leonardi v. Bradley Univ.*, 625 N.E.2d 431, 435-36 (Ill. App. Ct. 1993), appeal denied, 155 Ill. 2d 565 (1994). In *Leonardi*, an Illinois appellate court refused to find that a landholder-invitee relationship existed between the university and a student who had been raped in a fraternity house located on-campus. *Id.* The court reasoned that there were "no facts alleged ... which show that plaintiff's location at the time of the assault was connected with any activity conducted or sponsored by Bradley or that Bradley received any benefit from her presence at the fraternity house." *Id.* at 435. Additionally, the court relied on the fact that the fraternity house itself was not owned by the university. *Id.* at 436. The court did not address the Furek decision. One Justice dissented. *Id.* at 436-39 (Breslin, J., dissenting). For a discussion of this dissent, *see infra* notes 195-203 and accompanying text.

[149] *Furek*, 594 A.2d at 521-22.

[150] *Id.*

[151] *Id.* at 522.

[152] 596 So. 2d 1324, 1332 (La. Ct. App. 1991), *cert. denied*, 604 So. 2d 998 (1992).

[153] *Id.* at 1334.

[154] *Id.* at 1332. Plaintiff had been using a trash container lid as a "sled." *Id.*

[155] *Id.*

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[156] *Id.* at 1332-33

[157] *Pitre*, 596 So. 2d at 1332-33.

[158] *Id.* at 1332. The court stated that "[u]niversities guide many aspects of student life by undertaking to provide food, housing, security and a wide range of extracurricular activities." *Id.*

[159] *Id.* Judge Brown wrote the majority opinion. This opinion was written on rehearing, and reversed a prior decision the court made. In the original opinion, reprinted before the final opinion, Judge Brown dissented. *See Id.* at 1330-31 (original opinion) (Brown, J., dissenting). In his dissent, Judge Brown more emphatically asserted that the student-college relationship created a duty to supervise and protect the student:

> The concentration of young people on a college campus creates conditions that can cause injuries. Therefore, colleges have enacted many rules and regulations to protect its [sic] students. A college has a special relationship with its resident students which obligates it to take reasonable and necessary steps to protect their safety from foreseeable harm.... College administrators know that a 20 year old may be an adult legally, but normally lacks the experience to understand adulthood. *Id.* at 1330-31 (Brown, J., dissenting).

[160] *Id.* at 1332.

[161] *Id.* at 1333.

[162] The court reasoned that the school, through statements in its housing manual, had implied that sledding was safe at the area where the accident occurred. *Pitre*, 596 So. 2d at 1333. The court noted that the university had listed several spots in its housing manual where sledding was prohibited. *Id.* The spot where the accident had occurred was not listed. The manual otherwise encouraged sledding. *Id.* at 1332. However, the court noted that the campus police considered the area dangerous, and had made routine efforts to stop sledding at that spot. *Id.* at 1333-34.

The dissent in *Pitre* argued that the majority's opinion would make the college responsible for ensuring the safety of their students.[163] This standard would contradict the generally accepted rule that colleges no longer stand in an *in loco parentis* relationship to their students.[164]

### C. Providing Safety Measures for Student Athletes

In *Kleinknecht v. Gettysburg College*,[165] the Third Circuit Court of Appeals, the same court that decided *Bradshaw* almost fifteen years earlier, held the college to a duty to protect a student from harm while engaging in a school-sponsored athletic activity for which the student had been recruited.[166] Richard Kleinknecht, a seemingly healthy athlete, died of cardiac arrest on campus during a practice session for the school's lacrosse team.[167]

Kleinknecht's parents sued the university, claiming that it failed to implement reasonable preventative measures to ensure prompt medical attention if one of its athletes suffered cardiac arrest.[168] The trial court granted the university's motion for summary judgment on the grounds that the university had no duty to anticipate and guard against the chance that a young, healthy athlete would suffer cardiac arrest.[169] The Third Circuit reversed the summary judgment.[170] In finding a special relationship, the court reasoned that the school assumed such a responsibility because the student participated in a school sponsored and supervised activity.[171] The court differentiated the case from *Alumni Association v. Sullivan*,[172] decided by the Pennsylvania Supreme Court,[173] and *Bradshaw*, which had been decided under Pennsylvania law.[174] The court reasoned that there was no special relationship in *Sullivan* or *Bradshaw* because the students had acted in their private capacities.[175] Kleinknecht, however, had been injured while acting in the school's interest.[176] The school's recruitment of Kleinknecht indicated that the school intended to benefit from his participation in the program.[177] The court stated in dictum that the result probably would have been different if the student had been participating in intramural sports.[178]

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[163] *Id.* at 1333-34 (Lindsay, J., dissenting).

[164] *Id.* The dissent also argued that the danger posed by the light posts was minimal, thus posing no unreasonable risk of harm. *Id.* at 1334. The Louisiana Supreme Court refused to review the decision. *Pitre v. Louisiana Tech Univ.*, 604 So. 2d 998 (La. 1992) (three of seven justices wishing to grant certiorari).

[165] 989 F.2d 1360 (3d Cir. 1993).

[166] *Id.* at 1369.

[167] *Id.* at 1365. According to the court, the plaintiff's brief described Kleinknecht as "a healthy, physically active and vigorous young man" with no unusual medical history until his death." *Id.* While the college employed two full-time trainers who were skilled in C.P.R., neither was present during the practice at which Kleinknecht died and the lacrosse coaches had no such training. *Id.* at 1363.

[168] *Id.* at 1365.

[169] *Id.* at 1332 (citing *Kleinknecht v. Gettysburg College*, 786 F. Supp. 449, 454 (M.D. Pa. 1992)).

[170] *Kleinknecht*, 989 F.2d at 1372.

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[171] *Id.* at 1367. The court cited as supporting authority cases involving high school athletic programs. *Id.* The court cited to one case involving athletics at the college level. *Fox v. Board of Supervisors*, 576 So. 2d 978 (La. 1991). In *Fox*, however, the court held that the university had been under no duty to protect the student athlete in that case. *Id.* at 983. In *Fox*, Louisiana State University (L.S.U.) hosted a visiting rugby team. Before the scheduled game, the L.S.U. team hosted a cocktail party to which the visiting team was invited. *Id.* at 980. Tim Fox, a player on the visiting team, became intoxicated at the event. During the subsequent game, Fox missed a tackle and fell on his head, rendering him a quadriplegic. Fox sued the university on the theory that it had a responsibility to supervise the game and monitor the drinking before the competition. *Id.* The trial court granted summary judgment in favor of L.S.U. *Id.* The appellate court affirmed. *Fox v. Board of Supervisors*, 559 So. 2d 850 (La. Ct. App. 1990). The Supreme Court of Louisiana affirmed. *Fox*, 576 So. 2d at 983. The court acknowledged that L.S.U. had a duty to ensure that its premises were free from defects. However, the court held that no special relationship existed between the injured student and L.S.U. The court reasoned that the injured party, a student at another school, had no connection with L.S.U. *Id.* at 982. Next, citing the demise of *in loco parentis* and the burden of supervisory responsibilities, the court refused to hold L.S.U. to a duty to monitor the actions of its rugby players. *Id.* at 982-83.

[172] 572 A.2d 1209 (Pa. 1990). *See supra* notes 88-90 and accompanying text for a discussion of Sullivan.

[173] The court, exercising diversity jurisdiction, applied Pennsylvania law. *Kleinknecht*, 989 F.2d at 1365.

[174] *Id.* at 1367-68. For a discussion of *Bradshaw*, *see supra* notes 58-75.

[175] *Kleinknecht*, 989 F.2d at 1367-68.

[176] *Id.* at 1368.

[177] *Id.* The court suggested that the school recruited Kleinknecht "thinking that his skill at lacrosse would bring favorable attention and so aid the College in attracting other students." *Id.*

The court went on to find that the college, in failing to provide the safety equipment, had created a foreseeable and unreasonable risk of injury.[179] The court found that it was foreseeable that student athletes could encounter life-threatening health problems during athletic activity.[180] The court noted the testimony of the athletic trainers at the school who were aware of other instances in which athletes died during competition.[181] Examining whether the foreseeable risk was unreasonable, the court determined that the utility of taking potentially life-saving protective action outweighed the burden of imposing such responsibilities on the college.[182]

### D. Supervision of Students to Prevent Rape

In *Nero v. Kansas State University*,[183] the Kansas Supreme Court, facing a motion for summary judgment from the defendant university, refused to find as a matter of law that the university did not owe a duty to supervise the conduct of a potentially dangerous resident student.[184] In *Nero*, the plaintiff sued the university after she was sexually assaulted in her residence hall by a fellow student, Davenport.[185] Thirty-five days earlier, a different student had accused Davenport of raping her.[186] Davenport had been indicted for the first incident one month before the second.[187] The university administration moved Davenport to the plaintiff's dormitory in an effort to separate him from the first victim.[188]

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[178] *Id.* at 1368.

[179] *Id.* at 1371.

[180] *Kleinknecht*, 989 F.2d at 1370.

[181] *Id.*

[182] *Id.* One judge dissented, asserting the same reasons as the district court had expressed. *Id.* at 1375 (Alito, J., dissenting) (citing *Kleinknecht v. Gettysburg College*, 786 F. Supp. 449 (M.D. Pa. 1992)).

[183] 861 P.2d 768 (Kan. 1993).

[184] *Id.* at 179-80.

[185] *Id.* at 771-72. Davenport joined Nero while she had been watching television and doing laundry in the basement recreation room of her dormitory. According to the court, Davenport sexually assaulted Nero while the two watched television. *Id.* at 772.

[186] *Id.* at 771.

[187] *Id.*

The defendant's motion for summary judgment claimed that the university owed no duty to monitor Davenport.[189] In rejecting this argument, the Kansas Supreme Court agreed that *in loco parentis* was inappropriate for the modern campus.[190] Nevertheless, the court found that the university could have a duty to exercise care to protect the plaintiff from Davenport via the parties' landlord/tenant[191] and landholder/invitee relationships.[192] Pointing to the university's knowledge of the alleged rape and its response in moving Davenport, the court held that the foreseeability of the attack could not be decided as a matter of law on summary judgment.[193] Thus, the judge's ultimate finding as to whether the university's non-action constituted an unreasonable and foreseeable risk to the plaintiff depended on subsequent findings of fact.[194]

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[188] *Nero*, 861 P.2d at 771.

[189] *Id.* at 768.

[190] *Id.* The court also refused to posit a duty based on the plaintiff's argument that the university was in charge of a person with "dangerous propensities," as recognized in § 319 of the *Restatement (Second) of Torts*. The court reasoned that the university had not taken charge of Davenport when it changed his dormitory assignments. *Nero*, 861 P.2d at 778-79.

[191] *Id.* at 779. The court found that the university, in providing campus housing, existed as a landlord in competition with other private landlords. *Id.* *See* generally *supra* note 108 for a discussion of the common-law duty of the landlord to protect tenants against foreseeable crime.

[192] *Nero*, 861 P.2d at 780. The court cited to § 344 of the *Restatement (Second) of Torts*. *See supra* note 52 for the text of § 344.

[193] *Nero*, 861 P.2d at 780.

[194] *Id.* Two justices concurred in some parts of the opinion, but dissented regarding the finding of foreseeability. Justice Six concurred in the court's holding that the college did not act *in loco parentis*. *Id.* at 783 (Six, J., concurring and dissenting). However, Justice Six dissented from the court's holding that the attack was foreseeable. The Justice reasoned that the student had been charged with rape but had not been convicted. According to Justice Six, because the criminal justice system regards those charged with a crime as being innocent until proven guilty, it would be improper to require the university to single out such an individual for special supervision. *Id.* Justice McFarland joined the concurring and dissenting opinion of Justice Six. *Id.* at 788 (McFarland, J., concurring and dissenting). In a separate opinion, Justice McFarland argued that the majority sought to place an unreasonable burden on the university. The university would be faced with a student presumed innocent by the law, who in most cases would be under instructions from his

Similarly, in *Leonardi v. Bradley University*,[195] the dissent vigorously argued that the university should have been held to a duty to protect a student from a rape by a fellow student that occurred in an on-campus fraternity house.[196] The majority refused to find a special relationship, claiming that no landholder/invitee relationship existed.[197]

The dissent concluded, however, that the student was a business invitee, reasoning that (1) the student had been expressly invited onto the university premises; (2) that the university had permitted the actions of the fraternity to take place; and (3) that the university had benefited from the fraternity's presence.[198] Next, the dissent emphasized the foreseeability of campus rape, pointing to statistical studies both at colleges in general and at Bradley University in particular.[199] The dissent next reasoned that the likelihood of injury in rape cases is extremely high,[200] and pointed to medical studies indicating the physical and psychological effects of rape.[201] The dissent reasoned that the burden of placing protective responsibilities on the university was low.[202] The dissent reasoned that colleges already disseminate large quantities of information to students, and that instituting programs to warn students of such potential dangers is an extremely low burden.[203]

## V. THE EMERGING DUTY TO SUPERVISE

### A. Analysis

During the 1990s, courts have held colleges to greater responsibilities to oversee the lives and activities of their students. This threat of tort liability is moving the student-college

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lawyer to keep silent. Thus, while the university cannot discuss the events with the alleged perpetrator, it would be required to treat him like a pariah, and alienate him from female students. *Id.* at 789.

[195] 625 N.E.2d 431 (Ill. App. Ct. 1993).

[196] *Id.* at 436-39 (Breslin, J., dissenting).

[197] *Id.* at 435-36. For a discussion of the majority's reasoning, *see supra* note 148.

[198] *Id.* at 437 (Breslin, J., dissenting).

[199] *Id.* at 438 (Breslin, J., dissenting).

[200] *Leonardi*, 625 N.E.2d at 438 (Breslin, J., dissenting).

[201] *Id.*

[202] *Id.*

[203] *Id.*

relationship back towards *in loco parentis*.[204]

Because the duty question revolves around policy, it appears that courts are reexamining the policy foundations upon which *Bradshaw* was based.[205] First, courts seem to be recognizing an *in loco parentis* role for colleges, if not an *in loco parentis* special relationship in tort theory.[206] While no cases, except perhaps for *Pitre*,[207] assert a protective relationship based solely on the generic student-college relationship, decisions expanding the college's duty have relied on elements unique to the college context to find a duty. *Mullins*, *Pitre*, and *Furek* expressly point to aspects of the college setting that cause students to depend on the university for protection.[208] Dependence characterizes the historic *in loco parentis* relationship.[209] It is questionable whether courts would find a similar duty if the parties were not a student and a college. For example, in *Nero*, the court probably would not have held a non-university landlord or landholder to a duty to supervise the behavior of a tenant in its building solely because the tenant had been indicted for a crime.[210] Similarly, in *Furek*, it seems unlikely that the court could find any fact situation under which it would hold a non-university landlord or landholder to a duty to monitor fraternity hazing on its property.[211] Moreover, the court's reliance on contract principles in *Furek* is analytically weak, and provides a typical example of the flaws of contract analysis.[212] The court in *Furek* provided no evidence that students actually relied on and expected the college to enforce its homilies against hazing by patrolling fraternity houses.[213] Rather, it appears that the court's assumptions were based on its perception that the college fulfills a custodial role.

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[204] *See* Matthews, *supra* note 1, at 38, 42, 47 (remarking in the context of crime prevention that "[a]ll this resembles a revival of the *in loco parentis* doctrine," and a "newfound paternalism").

[205] *See supra* notes 23-25.

[206] For a discussion of the *in loco parentis* relationship, *see supra* part II.B.

[207] *See Pitre*, 596 So. 2d at 1332-33. *See* generally *supra* notes 152-64 for a discussion of *Pitre*.

[208] *See, e.g.*, *Leonardi*, 625 N.E.2d at 438 (noting high probability that women will be victimized by rape or sexual assault while in college).

[209] *See supra* part II.B. for a discussion of *in loco parentis*.

[210] *See Nero v. Kansas State Univ.*, 861 P.2d 768, 780 (Kan. 1993).

[211] *See Furek v. University of Del.*, 594 A.2d 506, 520-21 (Del. 1991).

[212] *See Id.* at 520. *See* generally Dodd, *supra* note 48 (discussing analytical problems of contractual analysis as a tool for examining the student-college relationship).

[213] *See Furek*, 594 A.2d at 520.

It appears that modern courts may be re-examining the benefit of prohibiting universities from intruding on students' lives.[214] Society has become more concerned with hazing and alcohol use in recent years. Legislatures have imposed anti-hazing laws and courts have imposed greater liability on fraternal organizations and their individual members for hazing injuries.[215] Moreover, society has taken a stricter view of alcohol use in recent decades, as evidenced by increased drinking ages and stricter punishments for drinking and driving. Moreover, courts and legislatures have been more willing to impose dram shop and social host liability.[216] Thus, society has taken a different view of alcohol consumption than did the *Bradshaw* court, which dismissed beer drinking as a harmless rite of passage for students and an accepted practice for adults.[217]

Society has also become much more concerned with campus crime. [218] Perhaps the most telling manifestation of this is the Student Right-to-Know and Campus Security Act.[219] In passing the Act, Congress found that crime on campus was a serious and increasing problem.[220] Additionally, Congress found that "there is a clear need ... to encourage the development on all campuses of security policies and procedures...."[221] Prior to the Act, several states had enacted similar statutes.[222]

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[214] According to § 293 of the *Restatement (Second) of Torts*, the factors considered for determining the magnitude of the risk when finding whether the actor was negligent include: the social value of the interest in danger; the extent of the possibility that the actor's non-action will harm another; the extent of the harm likely to occur; and the number of persons likely to be harmed. *Restatement (Second) of Torts* § 293 (1965).

[215] *See* generally Susan J. Curry, *Note, Hazing and the "Rush" Toward Reform: Responses from Universities, Fraternities, State Legislatures, and the Courts*, 16 J.C. & U.L. 93 (1989) (documenting cases that have increased fraternity liability and legislative attempts to reduce hazing); Byron L. LeFlore, Jr., *Note, Alcohol and Hazing Risks in College Fraternities: Re-evaluating Vicarious and Custodial Liability of National Fraternities*, 7 REV. LITIG. 191 (1988) (documenting the expanding theories that plaintiffs use to hold national fraternities liable for hazing).

[216] Dram shop statutes, which are relatively common, impose civil and criminal liability for the harm caused by the actor's negligent conduct on businesses that served alcohol to the intoxicated actor. Social host liability, to which the courts have reacted lukewarmly, imposes liability for negligence on social hosts who serve alcohol to intoxicated guests. *See*, e.g., *McGuiggan v. New England Tel. and Tel. Co.*, 496 N.E.2d 141, 145-46 (Mass. 1986) (favoring social host liability in certain fact situations). For general discussions of such concepts, see Angelina Marie Massari, *Am I my Brother's Keeper? Social Host Liability Under Dramshop Acts and Common Law Negligence*, 32 Wash. U. J. Urb. & Contemp. L. 149 (1987); Kevin N. Koloff, *Note, The Torts of the Intoxicated: Who Should be Liable?* 15 Colum. J.L. & Soc. Probs. 33 (1979).

[217] *See supra* notes 73-75 and accompanying text.

[218] *See*, e.g., Matthews, *supra* note 1, at 38 ("Campus murders or threat of murder invariably make it to page 1 of local and national newspapers...."). Matthews quoted one university

Additionally, the problem of sexual assault on campus has increased, and has accordingly experienced enormous coverage in the media.[223] There has also been a recent backlash against student-faculty romantic encounters. Several colleges have banned such conduct, indicating the view that the college must protect its students, a hallmark of *in loco parentis*.

Moreover, it appears that society may no longer view intrusion into the student life as a serious harm.[224] *Bradshaw* relied on findings that custodial policies were inconsistent with the student-college relationship. In recent years, commentators have suggested that students, essentially acting as consumers, expect colleges to provide such functions.[225]

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administrator: "Our only campus crime used to be plagiarism, but so much odd stuff appeared in the 80's - rapes, robberies, even the kid who used his prosthetic arm to beat up a dormmate - that I decided we needed to know: Is it us or is it society?" *Id.* at 38-39.

[219] Pub. L. No. 101-542, 104 Stat. 2381 (1990) (codified as amended at 20 U.S.C. § 1092(f) (Supp. IV 1992)). For the text of the reporting requirements, *see supra* note 112.

[220] Student Right-To-Know and Campus Security Act, Pub. L. No. 101-542, § 202, reprinted in 1990 U.S.C.C.A.N. 2381, 2384-85.

[221] *Id.* § 207(7)(A).

[222] *See* McEvoy, *supra* note 101, at 148-51.

[223] *See*, e.g., CNN & Company, supra note 14 (discussing proposed rule to ban student-faculty sexual relationships at University of Virginia).

[224] According to § 292 of the *Restatement (Second) of Torts*, the factors courts should consider the determining the utility of an actor's non-action when determining negligence include: the social value of the interest protected by the non-action; the possibility that this interest will be protected by the non-action; and the likelihood that this interest can be protected by a less dangerous course of conduct. *Restatement (Second) of Torts* § 292 (1965).

[225] Anne Matthews suggested that students are demanding increased protection:

> Today's students, trained as consumers from the cradle, frequently prefer

Moreover, courts seem to look to the expectations of parents as opposed to those of students. Courts perhaps are viewing parents, who often foot the expensive tuition bill, as the true consumers of college education.[226]

## B. Recommendation

Courts should cautiously embrace the emerging duty to supervise. Because duty is a fact-specific question, it is difficult to formulate per se rules. Nevertheless, it is clear that students deserve protection against criminal attacks, even if this demands increased supervision. *Mullins* is correct in holding that such protection is expected by parents, students, and the community in general. *In loco parentis* was not abandoned so colleges

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> service to empowerment. In spirit if not in statute, *in loco parentis* is back. The widespread attitude "I get to do whatever I want but you have to protect me" is forcing overwhelmed, under-financed student-life staffs and campus security forces to improvise a new care-giving role: part concierge, part social worker, part bodyguard. Matthew's, *supra* note 1, at 38, 42, 47.

*See* also Szablewicz & Gibbs, *supra* note 10, at 453 ("During the 1980s, however, the college-student relationship began to show signs of change yet again. Students began to expect their colleges to get them jobs, provide them with tuition assistance and establish their careers. Further, the students demanded protections [against injuries]."); Kranhold & Farrish, *supra* note 14, at A1 ("Students and parents ... are demanding that colleges resume responsibility for students' drinking and sexual behavior"); see generally David Riesman, *On Higher Education: The Academic Enterprise in an Era of Rising Student Consumerism* (1981).

[226] *See*, e.g., Katherine Farrish, *Trinity's President has seen Student Protests from Both Sides; Trinity President has Experienced Student Protests from Both Sides*, Hartford Courant, May 3, 1993, at A1. According to the Farrish article:

> Parents and students are once again demanding that colleges take action in response to date rapes, crime and racial and sexual harassment ... [The president of a college,] [w]hile open to listening to students as much as possible ... ultimately answers to trustees, faculty and parents. *Id.*

*See* also Student Right-To-Know and Campus Security Act of 1990, Pub. L. No. 101-542, § 202(6), reprinted in 1990 U.S.C.C.A.N. 2385 (discussing rights of parents to know information about campus crime); *Mullins v. Pine Manor*, 449 N.E.2d 331, 336 (Mass. 1983) (noting expectations of parents); CNN & Company, *supra* note 14 ("I'm just curious as to parents paying $8,000 to $10,000 to send their kids off to school - thinking the faculty is *in loco parentis* - how they would feel if they had a vote on whether the college faculty to get to bang the kids if the kids'll go along with it.").

could stop taking basic measures to protect their students from violent crime. Because the rate of student against student crime is so high, such limited supervision is a necessary part of basic protective measures.

But cases such as *Furek* and *Pitre* envision a much greater intrusion into the private lives of students. These cases envision a duty to supervise students to protect them from accidents occurring during non-school- sponsored events. Such accidents typically result from "traditional" campus activities such as drinking and fraternity and sorority hazing. It is foreseeable that many, if not most, college students will participate in some "dangerous," non-school-sponsored activities. Monitoring of such activities necessarily requires great levels of supervision, perhaps requiring even monitoring of the entire student body. Thus, imposing responsibilities to guard against accidental injuries sustained during non-school-sponsored events should be imposed with restraint.

Imposition of broad supervisory responsibility over non-student events certainly conflicts with the demise of *in loco parentis*. A broad parental role is inconsistent with the societal factors that gave rise to the demise of the doctrine in the first place. Universities continue to embrace the German model of education,[227] and continue to educate massive amounts of students. A parental role is especially not feasible in this context. Moreover, society continues to recognize college-aged persons as adults. There is no reason why those members of society who choose to go to college should be held less accountable for their own behavior. Thus, outside of the context of crime prevention, there is no compelling reason to justify a broad duty to supervise.

## CONCLUSION

American colleges have new parental obligations. A duty to supervise the student is emerging in the 1990s. Implicit in the reasoning of the decisions expanding this duty is the notion that the college acts as a custodian of its students, a throw-back to the *in loco parentis* relationship.

This recent judicial expansion may reflect the societal view that college is becoming an increasingly dangerous place for students. This judicial trend may reflect changes in the student-college relationship itself. Courts, however, should be hesitant to hold colleges responsible for monitoring non-school- sanctioned activities to prevent accidents. Enforcing such a responsibility would directly intrude on student freedom, and will unnecessarily burden colleges. Courts should impose liability with restraint, and be conscious of the effects that their holdings can have on the American student-college relationship.

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[227] *See supra* notes 33-37 and accompanying text.

# COMMENTARY

# CONSENSUAL SEXUAL RELATIONS BETWEEN FACULTY AND STUDENTS IN HIGHER EDUCATION *

by

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## I. INTRODUCTION

All things being equal, the choice of two consenting adults to engage in an amorous or sexual relationship is generally considered a private one. But things are rarely equal, especially with regard to professors and students in the alma-mater (or "foster-mother") setting of a university. Sexual interaction -- and indeed, misconduct -- in its various forms is not an infrequent occurrence between professors and students at this country's institutions of higher learning. In fact, surveys conducted in the early 1980s found that anywhere from 10% to 33% of female students at a number of campuses believed they had been subjected to sexual harassment at some time during their college careers.[1]

Awareness tends to increase the number of reported incidences, giving rise to stricter regulation, narrower terms, and a newly defined sense of boundary and consequence. In 1991, the Clarence Thomas/Anita Hill hearings dramatically focused the country's attention on sexual harassment, which caused an explosion in the number of sexual harassment claims. Since that year, the number of sexual harassment claims the U.S. Equal Opportunity Employment Commission (EEOC) receives has almost doubled, the agency reports.[2]

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[1] For a review of numerous surveys, *see* Walter B. Connolly, Jr. and Alison B. Marshall, "Sexual Harassment of University or College Students by Faculty Members." 15 J.C. & U.L. 381.

[2] Office of Communication and Legislative Affairs of the EEOC.

As goes the country, so go the country's campuses. According to the United Educators Insurance Risk Retention Group, which insures nearly 900 colleges, the number of sexual harassment claims brought against colleges they insure has approximately tripled over the past three years compared with the prior three-year period.[3]

Few would debate that unwanted sexual advances should be subject to some form of regulation, especially in a learning environment, where those in positions of authority might otherwise exert their power in ways that interfere with the educational process. But what about consensual sexual relationships between students and faculty members? Certainly, this area is one of the most troublesome to regulate. But a careful look at the evolution of institutional policy and case law regarding both sexual harassment and consensual relations offers sufficient basis for some new conclusions about sexual policy-making on campus.

It was in 1904 that Harvard became the first university in the country to adopt a policy on consensual relationships.[4] The policy banned all sexual relations between teachers and students whom they either taught or supervised.[5] Since then, more than twenty colleges and universities have followed suit, adopting similar policies.

To some on college campuses, these policies are essential to prevent exploitation of students. To others, however, the mere idea of regulation threatens not only to further separate the sexes, but also inhibits free and open exchange of ideas and places dangerous limitations on First Amendment associational rights. Consequently, university policy-makers must find their way through ever more difficult legal and ethical territory, where protecting one right may mean foregoing another. They walk a tightrope, attempting to balance three primary interests: 1) a student's right to protection from unwelcome sexual advances; 2) the rights of consenting adults to engage in sexual relations with the person of their choice; and 3) the right of third parties to a fair grading system.

Universities have typically adopted one of three types of policies on consensual relationships. The most common policy prohibits sexual relationships between faculty and students over whom the same faculty have grading authority. These limited policies preserve the integrity of the grading process and protect students at a cost of infringement upon sexual relations between consenting adults. These policies have generally been adopted with limited controversy at such disparate institutions as the University of Iowa,[6] California State University at Chico[7], and Oberlin College.[8]

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[3] "Unique Issues in Sexual Harassment Litigation," Constance B. Neary, Presentation at 1994 Annual Conference of the National Association of College and University Attorneys (NACUA).

[4] Peter DeChiara, "The Need for Universities to Have Rules on Consensual Sexual Relationships Between Faculty Members and Students," 21 Colum. J.L. & Soc.Probs. 137, 138 n.6 (1988).

[5] *Id.*

The second type of policy is merely advisory, typically suggesting that faculty members not become amorously involved with students. Stanford University recently adopted a policy that warned that "there are special risks in any sexual or romantic relationship between . . . teacher and student," and "even when both parties have consented at the outset of romantic involvement, this past consent does not remove grounds for a complaint based upon subsequent unwelcome conduct."[9] Such advisory policies preserve the intimacy rights of individuals but provide very little protection to the grading process and little comfort to students who are unreceptive to sexual advances.

The most controversial policies are broad prohibitions on sex between faculty and students. These policies offer the greatest protection to students and the grading process, but the price is so substantial that they are frequently rejected in favor of less stringent policies. In a recent case, the Committee on Women's Concerns at the University of Virginia proposed a policy that would have banned all consensual romantic relationships between students and teachers.[10] Heated debate ensued on campus along with unwelcome nationwide publicity that created the implication that more sex was happening between students and faculty than the facts supported.[11] A number of faculty objected to what they regarded as an unfair infringement on their rights to become romantically involved with the person of their choice.[12] Ensuing media attention caused the Committee on Women's Concerns to modify its stance, resulting in the eventual acceptance of a policy that merely prohibits sexual relations ... or overtures between teachers, supervisors and evaluators and any student over whom he or she holds a position of authority.[13]

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[6] *Id.*

[7] *San Francisco Chronicle*, April 24, 1993 at A20.

[8] *New Rules About Sex on Campus*, 287 Harper's 33, 36 (September 1993).

[9] *Id.*

[10] *Washington Post*, April 23, 1993 at B1.

[11] *Id.*

[12] *Id.*

[13] *Id.*

A similar pattern of retreat has occurred at many other institutions where equally sweeping prohibitions had once been sought. At nearby William & Mary, for example, a broad ban was proposed, only to be dropped when the State Attorney General deemed the ban illegal.[14] Eventually William & Mary adopted a ban only on relationships between faculty and students over whom faculty had grading authority.[15] At the University of Texas at Arlington, the school attempted to adopt a policy that would have declared romantic relationships with students a breach of professional ethics.[16] The proposal was defeated by the university faculty, and no policy was adopted.[17] A similar sequence occurred at the University of Washington.[18]

The issue of consensual sexual relations between students and faculty members is an important one. But in their eagerness to draft (and pass) new policy, university administrators seem to overlook ways in which they might strengthen existing policy to achieve the desired end. Existing sexual harassment policies, which apply to the entire academy, could provide the needed basis for further elaboration of what is considered right and wrong. Recently, three major changes in sexual harassment law have significantly increased the importance of universities taking preventive measures against harassment. In 1986, the Supreme Court established in *Meritor Savings Bank v. Vinson* that plaintiffs could recover in a sexual harassment action based on a hostile environment theory.[19] The Civil Rights Act of 1991 significantly expanded the remedies available in sexual harassment cases. In 1993, the Supreme Court stated that plaintiffs do not need to suffer psychological damage before they can recover damages in a sexual harassment hostile environment claim.[20] In effect, the Supreme Court further opened the door through which hostile environment claims can be brought.

Balancing the rights of students, faculty, and third parties in developing a sexual relations policy which can pass constitutional and academic muster demands some hard choices. No legal definition has ever been established for the term "sexual," let alone such alternative terms as "consensual," "amorous," or "relationship," all of which are used in this type of regulation. The vagueness and practical enforcement problems connected with any policy that forbids any of these as yet undefined terms are obvious. Furthermore, a sexual harassment policy cannot ensure the rights of third parties to a fair grading process. Any attempt to protect the integrity of the grading system necessarily involves some sacrifice of associational rights, a trade-off each institution must weigh and consider. However, a strong sexual harassment policy reduces the difficult choices an institution must make, while simultaneously helping the institution avoid the ever increasing possibility of liability for harassment of a student by a faculty member.

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[14] *Id.*

[15] *Id.*

[16] *Chron. of Higher Educ.*, Dec. 17, 1986 at 1, 16.

[17] *Id.*

[18] *New York Times*, April 14, 1993 at B9.

[19] 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986).

[20] *Harris v. Forklift Systems.* ___ U.S. ___ 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).

## II. CASE LAW ON CONSENSUAL AMOROUS RELATIONSHIPS

The case law on consensual sexual relations is sparse and indeterminate, with no case directly addressing the constitutionality of a blanket prohibition against amorous relationships between students and faculty. The very indeterminacy of the law in this area often creates a cloud of uncertainty over how to handle this issue without unduly intruding on adults' privacy. Three cases have addressed the issue, but only indirectly, and these are subject to differing interpretations.

The most direct case is *Naragon v. Wharton*, in which a 29-year-old graduate student instructor at Louisiana State University became involved in a lesbian relationship with a freshman.[21] The freshman was not in any of the classes the instructor was teaching, and there was little likelihood that she ever would be.[22] By all indications, the relationship was consensual, and the university did not become involved until the student's parents learned of the relationship and demanded that LSU intervene.[23] Discussions with the instructor and student proved fruitless, with the instructor strongly holding that her relationship with the freshman student was a private matter.[24] University administrators at first took no action.[25] However, after the instructor's teaching contract expired, it was renewed with the proviso that she be removed from the classroom and assigned exclusively to research duties at her same salary level.[26]

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[21] 737 F.2d 1403 [18 Ed.Law Rep. [574]] (1984).

[22] 572 F.Supp. 1117, 1119 [14 Ed.Law Rep. [309]] (M.D.La 1983).

[23] 737 F.2d at 1404.

[24] *Id.*

[25] 572 F.Supp. at 1120.

[26] *Id.*

The instructor sued, claiming that she was reassigned solely because of her sexual orientation and that she had been denied her First Amendment right of association and her Fourteenth Amendment right to privacy.[27] At trial, the plaintiff lost on the grounds that the university had properly balanced its duty to enforce its educational mission against the plaintiff teacher's rights by reassigning her to a research job while continuing compensation at her previous salary.[28] The plaintiff instructor appealed to the Fifth Circuit, which rejected her claim on similar grounds. The court stated that "teachers are role models, good or bad, for students"[29] and upheld the right of a university to discipline a teacher "if it considered intimacy between a teacher and a student a breach of professional ethics on the part of the teacher and thought that it undermined the proper position and effectiveness of the teacher because of the perception of other students."[30]

On its face, the language in *Naragon* would seem to indicate that a university could take action against a teacher involved in a consensual sexual relationship with a student, whether or not the teacher is in a position of authority over that student. However, there is substantial question as to whether the plaintiff was in actuality reassigned because of the consensual relationship or because of her sexual orientation. A dissenting justice noted that LSU had taken no action in previous cases in which professors had been involved in consensual heterosexual relationships with students.[31] The university tried to distinguish this case by arguing that the previous cases had not involved complaints by the parents of the students.[32] However, the dissenting judge noted that even if this were true, the "parents' opposition to the relationship centered significantly upon the relationship's homosexual aspects."[33] The plaintiff therefore may have in fact been terminated on the grounds that she was homosexual rather than because she was involved in a consensual amorous relationship with a student.[34] Thus, although *Naragon* seems to support the right of universities to regulate consensual relationships, it is unclear whether the instructor's involvement in a consensual relationship is what actually motivated the university's decision to discipline her.

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[27] 737 F.2d at 1404.

[28] 572 F.Supp. at 1123.

[29] 737 F.2d at 1405.

[30] *Id.*

[31] *Id.* at 1407.

[32] *Id.* at 1405-1406.

[33] *Id.* at 1407.

[34] *Id.*

A second case is similarly unclear. In *Korf v. Ball State University*, a male professor was accused of making sexual advances toward male students and promising them better grades for sexual favors.[35] A university committee found that the professor had violated AAUP ethical guidelines, which prohibited "exploiting students for private advantage."[36] The university's board of trustees reviewed the committee's conclusion and terminated the professor's employment.[37]

Korf challenged his dismissal on the grounds that he was not provided notice of the standard of conduct to which he was held.[38] The court rejected his claim in an ambiguous holding. On the one hand, the court stated that many of the professor's advances were, in fact, unwelcome, and that most of the professor's sexual relationships with students were not totally consensual.[39] On the other hand, the court appeared to formulate a rule beyond a mere resolution of the case before it. The court stated that a professor should be judged not by the ordinary standard of the "person on the street" but by the higher standard of a "relationship existing between a professor and his student within an academic environment."[40] The court continued: "university professors occupy an important place in our society and have concomitant ethical obligations."[41] One commentator has argued that this language showed that "even if the court believed that the professor had probably sexually harassed the students, [the court] stated that the university could fire the teacher even if the relationships were consensual."[42] However another commentator has argued that because *Korf* involved non-consensual relationships, the case "does not adequately define the extent of constitutional protection in consensual relationships between faculty and students in institutions of higher education."[43] Given the question over how *Korf* should be interpreted, it is difficult to find significant guidance from the case on the legality of consensual relationships.

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[35] 726 F.2d 1222, 1224-1225 [16 Ed.Law Rep. [26]] (7th Cir.1984).

[36] *Id.*

[37] *Id.* at 1225.

[38] *Id.*

[39] 726 F.2d at 1227.

[40] 726 F.2d at 1222.

[41] *Id.*

[42] DeChiara at 151.

[43] Elizabeth Keller, "Consensual Amorous Relationships Between Faculty and Students: The Constitutional Right to Privacy." 15 J.C.& U.L. 21, 36-37.

A final case, *Board of Trustees of Compton Junior College v. Stubblefield*, involved a consensual relationship coupled with additional misconduct that provided ample grounds for the professor's termination.[44] In this California case, a policeman discovered a male professor and one of his female students in a state of undress in a parked car.[45] The policeman approached the car and identified himself. The professor responded by shouting obscenities at the policeman and reversing the car into him. The policeman was knocked over, sustaining minor injuries.[46] The professor then sped away and was finally subdued by the police officer after a high-speed chase.[47]

At an informal hearing, the professor's employment was terminated.[48] The professor challenged the termination in state court.[49] The California Court of Appeals spoke extensively about the high standard of conduct to which educators can be held:

> There are certain professions which impose upon persons attracted to them responsibilities and limitations on freedom of action which do not exist in regard to other callings. Public officials such as judges, policemen and schoolteachers fall into such a category ... It would seem that as a minimum, responsible conduct upon the part of a teacher, even at the college level, excludes meretricious relationships with his students *and* physical and verbal assaults on duly constituted authorities in the presence of his students (emphasis added).[50]

The difficulty in drawing conclusions from this case centers upon the fact that the court relied on both the professor's sexual activity and his assault on a police officer in justifying his termination. One commentator has stated that the court's reliance on both the sexual relationship *and* the professor's assault as grounds for its holding indicates that "the determination that the professor breached his ethical obligations was not necessary to support the court's conclusion."[51] However, another commentator relied on dicta after the holding to demonstrate that the court in *Stubblefield* would have allowed termination solely on the basis of the meretricious relationship.[52] The court stated that the "integrity of the educational system, under which teachers wield considerable power in the grading of students . . . is clearly threatened when teachers become involved in relationships with students . . ."[53]

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[44] 16 Cal.App.3d 820, 94 Cal.Rptr. 318 (1971).

[45] *Id.* at 320

[46] *Id.*

[47] *Id.*

[48] *Id.* at 319.

[49] *Id.*

[50] *Id.* at 321.

[51] Keller at 37.

Regardless of which commentator is correct, the case is further discounted because it was decided in 1971, at a time when the Supreme Court had just begun establishing the dimensions of a Fourteenth Amendment right to privacy. Thus dated, the case's precedential value under present law is at best limited.

Overall, the case law on consensual sexual relationships is sparse and indeterminate and has created legal uncertainty around proposals to limit consensual relations on college campuses. Moreover, both case law and campus regulations leave unrecognized the need for protection of victims of formerly consensual relationships gone sour. The interest in preserving the integrity of the grading system is set against the First Amendment associational interest of the student partners in any sort of relationship that poses such a threat. Consensual relationships also raise the difficult issue of how much protection an institution can provide a student without becoming too paternalistic or interfering with the student's constitutional rights.

## III. MAJOR CHANGES IN SEXUAL HARASSMENT LAW

### A. Early Origins of Sexual Harassment Law

The earliest sexual harassment claims arose under Title VII of the Civil Rights Act of 1964, which prohibits discrimination by an employer on the basis of race, color, religion, sex, or national origin.[54] The first harassment claim was not recognized by a court until 1976, when the Court of Appeals for the D.C. Circuit held that an employee's dismissal for refusal to engage in sexual relations with her supervisor constituted a violation of Title VII.[55] The early cases were all "quid pro quo" cases, in which sexual favors are demanded as a condition to either maintain employment or realize a job benefit.[56] A number of early sexual harassment claims against universities were similarly litigated under Title IX, which states that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination[57]on under any educational program or activity receiving federal financial assistance." The first claim under Title IX was brought in 1982 against Yale. In *Alexander v. Yale University*, a group of female students alleged that Yale had refused to seriously consider complaints of sexual harassment by women students.[58] The Second Circuit rejected all but one of the claims on the grounds that the students had not shown a "distinct and palpable injury."[59] In effect, the court embraced a quid pro quo theory. *Alexander* was effectively overruled by the Supreme Court six years later in *Meritor*.

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[52] DeChiara at 151.

[53] 91 Cal.Rptr. at 323.

[54] 42 U.S.C. § 2000e-2(a)(1).

[55] *Williams v. Saxbe*, 413 F.Supp. 654 (D.D.C.1976).

[56] *See e.g. Garber v. Saxon Business Prods., Inc.*, 552 F.2d 1032 (4th Cir.1977); *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3d Cir.1977); and *Heelan v. Johns-Manville Corp.*, 451 F.Supp. 1382 (D.Colo.1978).

Few sexual harassment claims have been litigated under Title IX subsequent to *Alexander*; preventing development of any useful body of sexual harassment case law to address what faculty resolutions attempt to regulate.[60] Instead, cases brought under Title IX frequently look to the more extensive, better developed case law under Title VII.[61] In addition, since the Civil Rights Act of 1991 does not apply to Title IX cases, Title VII now offers substantially greater remedies (such as punitive damages) to plaintiffs than Title IX

### B. Hostile Environment Claims

In the landmark case *Meritor Savings Bank v. Vinson*, the U.S. Supreme Court first recognized that plaintiffs could bring a sexual harassment claim under a hostile environment theory.[62] In *Meritor*, a bank teller was sexually approached by her branch manager.[63] She agreed to have sexual intercourse with him, fearing that she would be fired if she refused.[64] Over the next several years, she engaged in intercourse with her supervisor some forty or fifty times.[65] On various occasions her supervisor fondled her, exposed himself to her, and on one occasion raped her.[66]

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[57] 42 U.S.C. § 1447.

[58] 631 F.2d 178, 183 (2d Cir.1980).

[59] *Id.* at 183.

[60] Connolly and Marshall, 15 J.C.& U.L. at 391-392.

[61] *See e.g., Lipsett v. University of Puerto Rico*, 864 F.2d 881, 896-898 [51 Ed.Law Rep. [35]] (1st Cir.1988).

[62] 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986).

[63] *Id.* at 60, 106 S.Ct. at 2402.

[64] *Id.*

After she was terminated for using too much vacation time, the plaintiff sued the bank under Title VII.[67] The trial court ruled in favor of the bank on the grounds that the plaintiff failed to establish that a tangible job detriment resulted from the harassment.[68] In reversing the trial court, the Supreme Court held that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."[69]

*Meritor*and its subsequent case law interpretation have made two important points regarding hostile environment sexual harassment claims. First, the plaintiff's voluntary participation in the sexual conduct does not necessarily indicate that the sexual conduct was welcomed. Second, in some cases, employers may be held directly liable for harassment by a supervisor. This is particularly true if the employer knew or should have known of the harassment and failed to take appropriate remedial action or if the employer did not take proper remedial action after an employee reported harassment.

### C. Unwelcomeness Under *Meritor*

*Meritor* established that "the fact that sex-related conduct was 'voluntary' in the sense that [plaintiff] was not forced to participate against her will is not a defense . . ."[70] Rather "the correct inquiry is whether [plaintiff] indicated by her conduct that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."[71] However, the Court noted that "it does not follow that a complainant's provocative speech or dress is irrelevant as a matter of law in determining whether he or she found the sexual advances unwelcome."[72]

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[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* at 61-62, 106 S.Ct. at 2402-2403.

[69] *Id.* at 66, 106 S.Ct. at 2405.

[70] *Id.* at 68, 106 S.Ct. at 2406.

[71] *Id.*

[72] *Id.* at 69, 106 S.Ct. at 2406.

Overall, the Supreme Court directed lower courts in future cases to look to the totality of circumstances in determining unwelcomeness.[73] Subsequent to *Meritor*, a number of courts have held that a plaintiff's sexual comments and past history of sexual conduct are not relevant if they are not known to the harasser. In *Swentek v. USAIR, Inc.*, a flight attendant alleged that an airline pilot had created a hostile working environment.[74] Citing *Meritor*, the court specifically rejected the defendant's contention that the plaintiff's use of "foul language and innuendo in a consensual setting waived her protection against unwelcomeness."[75]

In *Mitchell v. Hutchins*, a trial court relied on *Meritor* to reject a similar defense in a hostile environment case.[76] The court held that the plaintiff's past sexual activity was irrelevant because the defendant was not aware of the past activity, and the activity was "remote in time or place to plaintiff's working environment."[77] The court further stated that "past sexual conduct does not create emotional calluses that lessen the impact of unwelcomed sexual harassment."[78]

These cases are particularly important in the context of sexual harassment of a student by a faculty member. In response to a harassment charge, the faculty member may try to introduce evidence of the student's past sexual conduct to either embarrass the student or show that the student was not offended. However, based on the case law subsequent to *Meritor*, such evidence would probably not be admissible and, in some cases, not discoverable.[79]

One difficult question on which case law is silent is how a court should respond to a sexual relationship that was once consensual but later becomes unwelcome. EEOC guidelines issued subsequent to *Meritor* state that the victim "must clearly notify the alleged harasser that his conduct is no longer welcome," and the victim has the burden of showing that any further sexual contact is work-related sexual harassment.[80] If the victim's refusal to engage in further conduct results in some tangible school-related detriment, then the victim could bring a quid pro quo sexual harassment claim.[81] Where consensual relationships once existed, the alleged harasser and victim often tell conflicting stories about the relationship; the question then becomes one of credibility of witnesses, which under *Meritor* should be determined by the trier of fact.[82]

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[73] *Id.* at 69, 106 S.Ct. At 2406 (citing EEOC Guidelines, 29 CFR § 1604.11(b) (1985)).

[74] 830 F.2d 552, 555 (4th Cir.1987).

[75] *Id.* at 557 (citing *Meritor*, 106 S.Ct. 2399 at 2407 and *Katz v. Dole*, 709 F.2d 251, 254 n. 3 (4th Cir.1983).

[76] 116 F.R.D. 481 (D.Utah 1987).

[77] *Id.* at 484.

[78] *Id.* at 485.

[79] In *Mitchell*, the court granted plaintiff's motions to quash defendant's subpoenas of individuals who could testify to her past sexual conduct. 116 F.R.D. at 482, 485-486.

### D. Liability for Harassment Under *Meritor*

Most courts interpret *Meritor* as requiring that employers be held strictly liable for harassment in quid pro quo cases.[83] No such consensus has emerged on how liability should be determined in hostile environment cases.[84] In *Meritor*, the Supreme Court rejected the lower court's holding that an employer is always vicariously liable for harassment by a supervisor.[85] However, the Court explicitly declined to establish definitive liability standards for hostile environment cases and instead suggested that lower courts look to traditional agency principles.[86]

The majority of post-*Meritor* courts have adopted a knowledge standard, which means that employers are liable when they either knew or should have known of the harassment but failed to provide prompt remedial action.[87] A number of circuits have explicitly refused to decide the issue.[88] The only case involving an institution of higher education to address the issue is *Lipsett v. University of Puerto Rico*.[89] In *Lipsett*, a medical resident at a university hospital alleged that doctors and other male residents had created a hostile environment by making sexual advances, directing sexual comments to her, and telling her that women did not belong in a surgical residency program.[90] Lipsett filed suit under Title IX, but the First Circuit looked to Title VII and *Meritor* for guidance on agency principles.[91] The court ruled in Lipsett's favor and stated that the appropriate standard under which an educational institution is liable is "whether an official representing the institution knew, or in the exercise of reasonable care, should have known of the harassment's occurrence, unless that official can show that he or she took appropriate steps to halt it."[92]

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[80] EEOC Policy Guidance on Sexual Harassment, *reprinted in Daily Labor Report* (BNA) No. 201. Section E (Oct. 10, 1988) at 3.

[81] *Id.*

[82] 477 U.S. at 69, 106 S.Ct. at 2406.

[83] Michael J. Philips, "Employer Sexual Harassment Liability Under Agency Principles: A Second Look at *Meritor Savings Bank, FSB v. Vinson*" 44 Vand.L.Rev. 1229, 1237-1238.

[84] *Id.*

[85] *Id.* at 72, 106 S.Ct. at 2408.

[86] *Id.*

[87] Maria M. Carillo, "Hostile Environment Sexual Harassment by a Supervisor Under Title VII: Reassessment of Employer Liability in Light of the Civil Rights Act of 1991" 24 Colum.Hum.Rts.L.Rev. 41, 71.

[88] *Id.*

It remains unclear, even after *Lipsett*, how these liability principles would be applied to a relationship between a student and a professor. Presumably, a professor who has grading authority over a student would be considered a supervisor for Title VII purposes. Not so clear is whether an instructor without grading authority over the student would be considered a supervisor or a co-employee, and which standard should apply. The issue of how liability principles should be applied to higher education cases remains unresolved.

### E. The Effect of the Civil Rights Act of 1991

Under the Civil Rights Act of 1964, prevailing plaintiffs in sexual harassment cases were entitled only to injunctive relief such as reinstatement, backpay, lost benefits and attorney's fees.[93] If a plaintiff left her job because of sexual harassment and soon managed to find a new job at a similar salary, then her backpay award would be insignificant because of her duty to mitigate damages.

The Civil Rights Act of 1991, however, allows prevailing plaintiffs the right to jury trials and the right to recover compensatory damages for emotional distress and mental anguish.[94] The 1991 Act further allows prevailing plaintiffs to recover punitive damages if the employer "engaged in discriminatory practices with malice or with reckless indifference" to the plaintiff's rights.[95] Damages are capped on a sliding scale ranging from $50,000 for an employer with 14 to 101 employees to $300,000 for employers with more than 500 employees.[96]

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[89] 864 F.2d 881 [51 Ed.Law Rep. [35]] (1st Cir.1990).

[90] *Id.* at 886-891.

[91] *Id.* at 884, 889-901. For a further discussion of application of Title VII law to Title IX cases, *see* Section IV, *infra*.

[92] *Id.* at 901.

[93] 42 U.S.C. § 2000e-5 (1988).

[94] 42 U.S.C. § 1981a (Supp. III 1992).

The larger damage awards possible under the Civil Rights Act of 1991 increase the incentives to bring sexual harassment claims, and larger damage awards are a carrot for plaintiffs' attorneys to finance these cases. The 1991 Act closely coincided with the Clarence Thomas/Anita Hill hearings, which dramatically focused national awareness of sexual harassment. As a result, the number of sexual harassment claims filed has significantly increased.[97]

### F. Effect of *Hanis v. Forklift Systems*[98]

In 1993 in *Hanis v. Forklift Systems,* the Supreme Court addressed the level of harassment needed for conduct to be actionable. Harris was a manager at an equipment rental company.[99] The company's president frequently insulted her because of her gender, calling her a "dumb-ass woman" and saying "You're a woman, what do you know?"[100] He would often throw objects on the ground and ask women to pick them up. On other occasions, he asked women to remove coins from his front pants pocket.[101] He also made sexual innuendos about Harris' and other women's clothing. [102] Harris told the company president that she found his conduct offensive, after which he stopped his harassment for a while but soon resumed to form.[103] Harris later resigned from her job and sued the company under Title VII.[104]

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[95] *Id.*

[96] 42 U.S.C. § 1981a (Supp. III 1992).

[97] *See*, note 4 supra.

[98] ___ U.S. ___, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).

[99] *Id.* at 369.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

The trial court found this to be a close case.[105] The court held that although many of the comments Harris was subjected to would have offended a reasonable woman, they were not actionable because they were not severe enough to be abusive or interfere with her work performance.[106] In reviewing the case, the Supreme Court attempted to establish a standard for hostile environment claims that takes "a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."[107] In a 9-0 decision, the Court stated that so long as the environment was perceived as abusive by the victim and would be similarly perceived by a reasonable person, "there is no need for it to be psychologically injurious."[108] The Supreme Court directed lower courts to look to "the frequency of the conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[109] The Court stated that no one factor should be controlling, and all relevant factors should be taken into account.[110]

*Harris* is particularly significant since the Civil Rights Act of 1991 allows emotional distress damages as a remedy. In effect, the Court has lowered the threshold for bringing a hostile environment claim while increasing the potential value of claims to plaintiffs and further increasing the potential liability of defendants.

## IV. RIGHTS OF FACULTY ACCUSED OF HARASSMENT[111]

While universities must be sensitive to student complaints about sexual harassment, they must also be careful not to violate the rights of faculty members accused of sexual harassment. In two recent cases, professors who were dismissed because of alleged sexual harassment received large damage awards in suits against their former colleges. In one case, a theater professor at Bennington College was terminated after he was accused of sexually assaulting a male student.[112] The professor sued, alleging that the college had violated the terms of his contract by restricting his right to defend himself at the termination hearing.[113] A jury in federal court awarded the professor $500,000 in compensatory damages in spite of the judge's instruction to cap damages at $272,712[114] The judge later reduced the award to $202,794.[115] In a second case, a professor at the University of Puget Sound was accused of sexually harassing three female students.[116] The professor alleged that the university did not sufficiently investigate the accusations and improperly forced him to resign.[117] A jury awarded the professor a total of $1.5 million in damages including $157,845 for past economic damages, $1,199,268 for future economic damages, and $142,887 for emotional distress.[118] The judge later ruled that the university also had to pay the professor $122,953 to cover his legal fees.[119]

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[105] *Id.*

[106] *Id.* at 370.

[107] *Id.* at 370.

[108] *Id.* at 371.

[109] *Id.*

[110] *Id.*

[111] For a further discussion of the due process rights of faculty members in sexual harassment cases, see Harrison Marshall and D. Frank Vinik, "Dealing with Sexual Harassment on College Campuses," forthcoming in *Proceedings*, newsletter of the North Carolina Association of Colleges and Universities.

Historically, courts have been reluctant to interfere with the results of college disciplinary proceedings. However, that reluctance is eroding in light of the huge stakes that an accused professor faces: dismissal because of sexual harassment can render a professor unemployable in higher education for the rest of his career. Consequently, courts are becoming increasingly sympathetic to claims that an accused professor should be given the rights to receive the assistance of counsel, interview witnesses, face the accuser, and possibly even cross-examine the accuser. Thus, any investigation of harassment claims must be as fair and objective as possible in considering the rights of both the accuser and the accused.

The potential of liability from multiple directions means that colleges face confusing and sometimes paralyzing conflicts of interest. Does the college have a duty to advise the accusing student or the accused professor? Or does the college have a duty to advise both? What happens if both parties decide to sue the institution? Then the institution faces an unresolvable conflict: anything it says to defend itself in one suit can be used against it by the plaintiff in the other suit.

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[112] "Jury Ignores Judge to Set Award in Suit," *New York Times*, July 24, 1994, at 24.

[113] *Id.*

[114] *Id.*

[115] Peter Crabtree, "Judge Cuts Jury Award to Teacher," *Rutland Herald* (Vt.), August 31, 1994, at 5.

[116] Steve Maynard, "Ousted UPS Prof Wins $1.5 million Judgement," *News Tribune* (Tacoma, Wash.), July 2, 1994 at A1.

[117] *Id.*

[118] *Id.*

[119] "UPS Told to Pay Ex-Professor's Legal Fees" *News Tribune* (Tacoma, Wash.), August 2, 1994 at B2.

## V. CONCLUSION

As the issue of consensual sexual relations has evolved, each answer has given rise to a new question. *Meritor* suggested that a plaintiff could recover damages from a [harasser's] employer (or, it would follow, an institution) based on the hostile-environment theory: If the institution knew, or should have known, that the harassment was taking place, the plaintiff prevails. *Naragon, Korf,* and *Compton Junior College* confused the issue, appearing to find that a university could discipline a teacher for sexual involvement with a student, even one not under his or her academic supervision; but in each case, extenuating circumstances fog any clear interpretation, failing to delineate the difference between how professors should behave and how they legally must behave. Even *Lipsett,* the only case against a university, fails to illuminate where liability would lie.

These precedents are anything but definitive. Still, they offer direction, if not caution, for universities seeking to protect most of the people, most of the time, without excessively infringing on the rest. Given existing case law, and given failed institutional policies, there are a number of steps colleges can take to deal with these complex situations.

First, colleges must make a major effort to strengthen their sexual harassment policies and educate students and faculty about harassment. High-level administrators should encourage faculty to attend workshops on sexual harassment. Furthermore, faculty members should be informed that they may be held personally liable if a court rules that the harassment occurred outside the scope of their employment. Students should be educated about sexual harassment at their freshman orientations and should be informed about what actions constitute harassment, who they can complain to, and that their anonymity will be protected if they so choose.

Second, universities should develop a policy for handling sexual harassment complaints. If a policy already exists, colleges should continue to review and revise the policy as the legal landscape changes. University administrators should be trained to implement the policy in a fair and evenhanded manner anytime a complaint is reported. The policy should dictate procedures for investigating complaints, holding hearings, and providing advice and counsel to both the accuser and the accused. The policy should also outline a schedule of progressive discipline based on the severity of the professor's conduct.

Third, colleges should consider adopting a policy on consensual sexual relations between students and faculty members. A broad policy that bans all sexual relations between students and faculty is likely to be rejected by faculty on the grounds that it too greatly infringes upon their rights of intimate association. On the other hand, an advisory policy that merely discourages consensual sexual relations provides little more protection than a strengthened policy on sexual harassment. The most favorable policy is one that limits sexual relations between faculty and students over whom they have grading or supervisory authority.

Even such a limited policy is by no means perfect. While it provides some protection for the integrity of the grading process, it does so at a cost of infringement upon associational rights. Some may argue that the grading process is already impure and is rife with biases based on race, gender, and social class. Others may argue that a policy on consensual relations will only drive such relationships underground, where they cannot be regulated. We believe colleges should be sensitive to two issues in developing such a policy. First, in adopting a policy, it is important for the university to provide an open forum where all points of view can be discussed and debated and all members of the university community can provide input. Second, if an institution decides to adopt a policy, it should develop ways in which conflicts involving consensual sexual relations can be resolved. An institution should establish user-friendly alternative mechanisms so that faculty members in consenting-relationship trouble have somewhere to go for advice and counsel. In addition, an institution should establish procedures for resolving such conflicts, such as allowing someone else to grade a student's work or allowing a student to transfer to another section of the course.

In a time of heightened awareness of sexual roles and behaviors, issues regarding sexual relations on campus are becoming increasingly complex. The traditional model. where young female students became involved in sexual relations with older male faculty members is rapidly changing. We are already seeing cases in which males allege harassment by females and in which harassment is alleged in non-heterosexual relations. In addition, as the number of older students on campuses continues to increase, universities may face cases in which older students are involved in sexual relations with younger faculty members. If the past is prescient, things can only get more complicated. Colleges should act quickly, carefully. and affirmatively to protect the balance of rights they wish to preserve.

## COMMENTARY

# *VERNONIA SCHOOL DISTRICT 47J v. WAYNE ACTON: LESSONS FOR COLLEGES AND STUDENT ATHLETES**

by

**VALERIE L. BROWN, J.D.****

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On June 26, 1995, the U.S. Court decided *Vernonia School District 47J v. Wayne Acton,*[1]which held that random, suspicionless urinalysis testing of student participants in athletics by a school district is not an unreasonable search under the Fourth Amendment in light of their diminished expectation of privacy, the "negligible intrusion of privacy" by the school district in conducting the test, and the district's interest in controlling the use of illegal drugs among students. This decision further bolsters school districts' authority to regulate secondary school students' conduct, which is consistent with a long line of cases in this area.[2] Significantly, the decision undermines the requirement of "individualized suspicion" as expressed in previous court decisions on Fourth Amendment rights and it is instructive for college administrators because of its implications.[3]

In negligence cases brought throughout this country by injured college athletes against colleges and universities, many courts have held little or no duty of care is owed by the institution to the student. Some courts assert that no "special relationship" exists that would give rise to a duty.[4] Others maintain that the student is not in an employer-employee relationship which would give rise to a *respondeat superior* claim.[5] Still others assert that unlike students at the primary and secondary school level, colleges do not stand *in loco parentis* and are not "a general insurer" of student safety.[6]

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[1] *Vernonia School District 475 v. Wayne Acton*, ___ U.S. ___, 115 S.Ct. 2386, 132 L.Ed.2d 564 [101 Ed.Law Rep. [37]] (1995).

[2] *New Jersey v. TLO,* 469 U.S. 325, 336-37, 105 S.Ct. 733, 740, 83 L.Ed.2d 720 [21 Ed. Law Rep. [1122]] (1985); *DeShaney v. Winnebago County Dept. of Social Services,* 489 U.S. 189, 200, 109 S.Ct. 998, 1005, 103 L.Ed.2d 249 (1989); *Bethel School District No. 403 v. Fraser,* 478 U.S. 675, 684, 106 S.Ct. 3159, 3165, 92 L.Ed.2d 549 [32 Ed.Law Rep. [12431] (1986) and *Goss v. Lopez,* 419 U.S. 565, 581-82, 95 S.Ct. 729, 740, 42 L.Ed.2d 725 (1975).

[3] *Illinois v. Krull,* 480 U.S. 340, 365, 107 S.Ct. 1160, 1174, 94 L.Ed.2d 364 (1987). *See generally,* Clancy, The Role of Individual Suspicion in Assessing the Reasonableness of Searches & Seizures, 25 Mem.St. U.L.Rev. 483, 528 (1994).

This paper addresses the question of whether a student athlete-college relationship is so special in the context of college sports as to give rise to a duty of care. If so, does the Supreme Court's decision in *Vernonia* give college officials a freer hand in conducting random, suspicionless searches for college athletes and non-athletes alike?

Part I examines the Supreme Court decision in *Vernonia.* Part II discusses the line of cases concerning college and university liability for student athletes. Part III debates the questions raised above. Part IV explores future trends.

## PART *I: VERNONIA SCHOOL DISTRICT 47J v. WAYNE ACTON*: AN ANALYSIS

### Facts of the Case

During the mid to late 1980s the Vernonia School District administrators noticed a "sharp increase" in drug use among school students, especially among student athletes.[7] The increased drug use led to an increase in the number of disciplinary referrals. The use of drugs, especially among student athletes, concerned administrators, particularly because of the risk of sports-related injury. Despite efforts to stem drug use by students, which included offering special classes and speakers, the problem persisted. It was at this time that the school district instituted a drug testing program, which was unanimously approved by parents.[8]

Under the policy, which applies to all students participating in interscholastic athletics, athletes are tested once at the beginning of the season. The athletes are placed in a pool from which a student, under the supervision of two adults, blindly draws the names of ten percent of the athletes for random testing. Those selected are notified that day, if possible.[9]

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[4] *University of Denver v. Whitlock* 744 P.2d 54 [42 Ed.Law Rep. [950]] (Colo.1987).

[5] *Rensing v. Indiana State University Board of Trustees*, 444 N.E.2d 1170 [9 Ed.Law Rep. [338]] (Ind.1983).

[6] *Swanson v. Wabash College*, 504 N.E.2d 327 [37 Ed.Law Rep. [916]] (Ind.App.Dist. 1987). *See also*, Lawrence F. Rossow and Jacqueline Stefkovich, *Vernonia School District v. Acton:* Suspicionless Drug Testing, 102 Ed.Law Rep. [897] (Oct. 19, 1995).

[7] *Supra* note 1, 115 S.Ct. at 4654.

[8] *Id.*

In conducting the sample testing, the student enters an empty locker room accompanied by an adult monitor. Boys produce a sample at a urinal, remaining fully clothed, with their backs to the monitor, who stands twelve to fifteen feet away. Girls produce samples in an enclosed bathroom stall, where they are heard but not observed. The monitor examines the samples for tampering and it is then sent to an independent laboratory.[10]

The laboratory does not know the identity of the student. The laboratory then mails the written report to the superintendent and advises school district personnel by telephone only after the official recites a code confirming his authority to receive this information. Only the superintendent, principals and vice principals and athletic directors have access to the results, which are kept for no more than one year.[11]

If the student tests positive, a second test is administered. If the second test is negative, no further action is taken. If the second test is positive, the student's parents are notified and the principal meets with the student and the parent. The student is given two options: (1) to participate in a six-week drug assistance program with weekly urinalysis or (2) receive a suspension from athletics for the remainder of the current season and the next season, at which time he or she would be retested. A second offense results in an automatic imposition of option (2) and a third offense results in suspension from athletics for the remainder of the current season and the next two athletic seasons.[12]

## Procedural History

Wayne Acton, a seventh grader, signed up for grade school football. He was denied participation because he and his parents refused to sign the testing consent forms. The Actons filed a lawsuit seeking declaratory and injunctive relief alleging that the policy violated the Fourth Amendment of the United States and Oregon Constitutions. The district court denied the claims on the merits and dismissed the action. The U.S. Court of Appeals for the Ninth Circuit reversed, holding that the policy violated the Fourth and Fourteenth Amendments. The United States Supreme Court granted *certiorari*.[13]

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

## Probable Cause/Privacy Expectation Issues

The U.S. Supreme Court began its analysis by noting that "a search unsupported by probable cause can be constitutional.... when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirements impracticable."[14] Such "special needs" exist in the public school context.[15] There, the warrant requirement "would unduly interfere with the maintenance of the swift and normal disciplinary procedures [that are] needed," and "strict adherence to the requirement that searches be based upon probable cause" would undercut the "substantial need for teachers and administrators for freedom to maintain order in the schools."[16]

Examining this case in the context of other search and seizure cases, the Court reasoned that in *New Jersey v. TLO*,[17] a warrant and probable cause was not required for school searches. A "reasonable suspicion" was sufficient. Further, the Court said the state's power is "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."[18] "A proper educational environment requires close supervision of school children, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult."[19] The Court noted that while students retain constitutional rights, these rights are limited.[20] Further, students are routinely subject to various physical examinations and vaccinations, and therefore have a lesser expectation of privacy than members of the public.[21] Privacy expectations are further diminished for student athletes because of the nature of "athletic participation."[22] Such students are subject to pre-season physical examinations, must acquire adequate insurance, maintain a minimum grade point average and comply with rules of conduct.[23] Thus, the Court said the student athletes have reason to expect intrusions upon the normal rights and privileges, including privacy.[24]

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[13] *Id.*

[14] *Id.* at 4655.

[15] *Id.*

[16] *Id.*

[17] *New Jersey v. TLO*, 469 U.S. 325, 342 n. 8, 105 S.Ct. 733, 743, n. 8, 83 L.Ed.2d 720.

[18] *Supra* note 1, 115 S.Ct. at 4655.

[19] *Id.* at 4655-56.

[20] *Id.* at 4656.

[21] *Id.*

In examining the degree of intrusion occasioned by the collection of urine samples, the Court viewed the "privacy interest compromised by the process of obtaining the urine sample" as "negligible"[25] because the conditions under which the samples were produced were "nearly identical to those typically encountered in public rest rooms.[26] Moreover, "the drug for which the samples are screened are standard" and.... "the results of the test are disclosed only to a limited class of school personnel who have a need to know "[27]

The Court did not question the school district's contention that testing was needed because the use of drugs among students had reached "epidemic proportions."[28] In fact, in *Skinner v. Railway Labor Executives' Assn.*,[29] the Court approved government drug testing of railroad employees without proof that a problem existed, and in *Treasury Employees v. Von Raab*,[30] the Court endorsed drug testing where there was no documented history of drug use by customs officials.

Further, in rejecting Acton's claim that the test should have been limited to those students suspected of drug use, the Court dismissed the notion that only the "least intrusive" search practicable can be reasonable under the Fourth Amendment.[31]

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[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* at 4656.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 617, 109 S.Ct. 1402, 1413, 103 L.Ed. 2d 639 (1989).

[30] *Treasury Employees v. Von Raab*, 489 U.S. 656, 665, 109 S.Ct. 1384, 1390, 103 L.Ed.2d 685 (1980).

[31] *Supra* note 1, 115 S.Ct. at 4658.

Significantly, the Court concluded that the most important factor in upholding the search is that the school district conducted the test "in furtherance of the government's responsibilities, under the public school system, as guardian and teacher of children entrusted in its care."[32]

## The Dissent

The dissenting opinion led by Justice Sandra Day O'Connor, argued that "mass suspicionless searches have been generally considered *per se* unreasonable within the meaning of the Fourth Amendment."[33] In a detailed examination of the warrant and the requirement for "individualized suspicion," the dissent noted that while "not all searches around the time that the Fourth Amendment was adopted required individualized suspicion -- although most did .... protection of privacy, not evenhandedness, was then and is now the touchstone of the Fourth Amendment."[34] However, the dissent noted that the Court has upheld several evenhanded blanket searches, including some that are more than minimally intrusive after balancing the invasion of privacy against the government's strong need.[35] These searches, the dissent said, are distinguishable because they were "personally intrusive."[36] Further, the dissent noted that suspicionless searches have been upheld only "after first recognizing the Fourth Amendment's longstanding preference for a suspicion-based search regime, and then pointing to sound reasons why such a regime would likely be ineffectual under the usual circumstances presented."[37] In the litany of cases, "an individualized suspicion requirement was often impractical .... because they involve situations in which even one undetected instance of wrongdoing could have injurious consequences for a great number of people."[38]

In concluding, the dissent affirmed that "the individualized suspicion requirement has a legal pedigree as old as the Fourth Amendment itself, and it may not be easily cast aside in the name of policy concerns. It may only be forsaken, our cases in the personal search context have established, if a suspicion-based regime would likely be ineffectual."[39]

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[32] *Id.*

[33] *Id.* at 4659.

[34] *Id.* at 4660.

[35] *Id.* at 4661.

[36] *Id.*

[37] *Id.*

[38] *Id.*

The dissent noted that the facts were meager to justify suspicionless drug testing. The Court said "there is a substantial basis for concluding that a vigorous regime of suspicion-based testing.... would have gone a long way toward solving Vernonia's school drug problem while preserving the Fourth Amendment rights of Wayne Acton and others like him."[40] While recognizing that suspicionless drug testing may be more effective as a means of controlling drug use, the dissent maintained that this is the price to pay for freedom. In fact, the dissent goes further, noting "intrusive, blanket searches of school children, most of whom are innocent, for evidence of serious wrongdoing are not part of the traditional school functions."[41]

## PART II: COLLEGE AND UNIVERSITY LIABILITY FOR STUDENT ATHLETES -- THE CASES

It has been long established that the college-student relationship is very different from the secondary school student-school district relationship. Colleges do not traditionally stand *in loco parentis* where college students are concerned. In the 1979 decision *Bradshaw v. Rawlings*,[42] the Third Circuit noted that the campus revolutions of the late 1960s and early 1970s affirm students' demand for more freedom. Societal changes, which also included the lowering of the voting age, and social upheavals resulted in limitations by colleges on student life on and off campus. The result has been that society considers the 'modern college student an adult, not a child of tender years."[43]

Elementary schools and high schools are part custodial and part educational institutions, largely because those who attend them are juveniles. However, "colleges and universities are educational institutions, not custodial. The purpose is to educate in a manner which will assist the graduate to perform well in the civic, community, family and professional positions he or she may undertake in the future. It would be unrealistic to impose upon an institution of higher education the additional role of custodian over its adult students .... fulfilling this charge would require the institution to babysit each student, a task beyond the resources of any school. But more importantly, such measures would be inconsistent with the nature of the relationship between the student and the institution, for it would produce a repressive and inhospitable environment, largely inconsistent with the objectives of a modern college education."[44]

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[39] *Id.* at 4667.

[40] *Id.* at 4662-63.

[41] *Id.* at 4663.

[42] *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir.1979), *cert. denied*, 446 U.S. 909, 100 S.Ct. 1836, 64 L.Ed.2d 261 (1980).

[43] *Beach v. University of Utah*, 726 P.2d. 413 [35 Ed.Law Rep. [545]] (Utah 1986).

The issue of college and university liability to students follows the same rationale. A number of cases have held that colleges and universities have little or no duty of care to students -- whether the student is an athlete or an academic. For instance, in the *University of Denver v. Whitlock*,[45] the Supreme Court of Colorado held that the university owed no duty of care, nor does it have a "special relationship" with a student who is injured while jumping on a trampoline at a fraternity house.[46] In this case, the Colorado Supreme Court reasoned that the mere authority to regulate the fraternity's use of the trampoline by enacting rules of student conduct is insufficient to establish that the university had the duty of care to exert control over the use of the trampoline by fraternity members. In this regard, the court said the college-student relationship has evolved to the point where the university is not an insurer of its students' safety.[47]

In *Beach v. University of Utah*, the Utah Supreme Court held that the university was not liable and had no duty of care to a drunken underage student who was injured off-hours, off-campus on a college sponsored field trip when she was injured by a fall in a canyon which resulted in her becoming a quadriplegic. In very direct language, the Utah court made clear that "a college student is not a child of tender years.... [I]t would be unrealistic to impose upon an institution of higher education the additional role of custodian over its adult students and to charge it with responsibility for preventing students from illegally consuming alcohol and, should they do so with the responsibility for assuring their safety and the safety of others."[48]

Likewise, in cases involving student athletes, similar holdings have prevailed. In *Swanson v. Wabash College*,[49] the Indiana Court of Appeals held that the college had no duty to a student athlete who was injured while playing recreational baseball at a city park for a college baseball off-time team. This case was distinguished from

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[44] *Id.* at 418-19.

[45] *Supra* note 4.

[46] *Id.*

[47] *Id.* at 416-18.

[48] *Id.* at 419.

[49] *Supra* note 6.

*Beckett v. Clinton Prairie School Corporation*[50] where a high school baseball player recovered against the school for injuries sustained from a collision with another baseball player during formal, organized team practice. In *Beckett*, the high school coach was aware of practice conditions and contravened his written instructions with the knowledge that his students were relying on his expertise. In *Wabash College*, however, the students playing recreational baseball were well aware that there would be no professional coaching assistance or supervision, or any written guidelines for playing. Instead of an organized, school-sponsored athletic event involving children, like that found in *Beckett*, *Wabash* "involves a group of college students who get together to practice baseball for various reasons in a city park."[51]

Similarly, in *Rensing v. Indiana State University Board of Trustees*,[52] the Indiana Supreme Court ruled that a student athlete injured during football practice was not an employee within the meaning of the workers' compensation laws, and therefore was not entitled to workers' compensation benefits because there was no intent by the parties to enter into an employee/employee relationship. Further, the student athletes' receipt of a scholarship to play football did not give rise to such a relationship. Finally, the Indiana Supreme Court said, "Courts in other jurisdictions have generally found that such individuals as student athletes, student leaders and student government associations and student residence hall assistants are not employees for the purpose of workers' compensation laws unless they also are employed in a university job in addition to receiving scholarship benefits."[53]

## PART III: COLLEGE AND UNIVERSITY LIABILITY FOR STUDENT ATHLETES -- ANALYSIS

College and university students have long been recognized in legal cases as adults who are responsible for their conduct. Colleges and universities are not "custodians" of these individuals. Institutions of higher education are places of higher learning. These institutions are not "insurers" of student safety and do not stand in a "special relationship" with students -- academic or athletic, absent some extenuating circumstances.

Negligence law is well settled too. The law does not impose a duty unless the relationship between the parties gives rise to the need for a duty, such as common carrier-passenger, innkeeper-guest, possessor-invited entrant, employer-employee, parent-child and hospital-patient or where there is some reliance or expectation of reliance.[54]

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[50] *Beckett v. Clinton Prairie School Corporation*, 494 N.E.2d 988 [33 Ed.Law Rep. [444]] (1986).

[51] *Supra* note 6 at 331.

[52] *State University Board of Trustees*, 444 N.E.2d 1170 [9 Ed.Law Rep. [338]] (Ind. App.1983).

[53] *Id.*

These holdings set the tone for college and university liability generally for students and student athletes. The cases make clear that colleges have diminished liability for students. The students, in turn, have diminished legal expectations because of the limited liability of colleges and universities. This diminished expectation was enhanced by the U.S. Supreme Court's decision in *Vernonia*. *Vernonia* essentially permits school districts (which are largely distinguishable from colleges and universities) to conduct random, suspicionless urinalysis testing of student athletes. The *in loco parentis* status of high school and grade school students to school districts is not in doubt. School districts' authorities are strengthened by *Vernonia*, and consequently student rights -- elementary and secondary -- are diminished. Similarly, if school districts that have a custodial relationship with students are permitted to conduct random, suspicionless searches, what does this portend for college students and student athletes? It would follow that colleges and universities, given the limited liability to students, may have a freer hand in conducting searches, and courts may be less inclined to impose liability on these institutions. Some scholars have argued that student athletes should have a "special" status because the increased interest in college athletics has translated into tremendous economic and non-economic benefits for colleges and universities and because large revenue-producing athletic events have become increasingly commonplace.[55]

## PART IV: FUTURE TRENDS

Given these enormous economic incentives to colleges and universities, is it fair that these institutions should benefit additionally by a court-imposed limited duty? This is an issue that is unsettled and may drive future court decisions.

The future trend bespeaks of lesser rights for secondary and postsecondary students with respect to privacy interests and in holding institutions liable in damages. The trend has been slowly developing as the cases herein reflect. While students do not "shed their rights at the schoolhouse gates,"[56] it is clear that their rights are circumscribed. Colleges and universities should learn from *Vernonia* and maintain clear guidelines regarding student conduct in athletic events and develop drug-testing guidelines that conform to professional sports organization standards, such as the NCAA and those upheld in *Vernonia*.

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[54] *See*, Restatement (Second) of Torts § 314 A(3) (1965).

[55] Edward H. Whang, *Necessary Roughness: Imposing a Heightened Duty of Care on Colleges for Injuries of Student-Athletes*, 2 Sports Lawyer Journal 25 (1995).

[56] *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985).

# Case Studies of Wrongdoing on Campus: Ethics and the Lawyer's Role

Stephen S. Dunham*

## Introduction

Much of what college and university lawyers do involves investigation and analysis of alleged wrongdoing.[1] We try to prevent it, we counsel against it, we investigate it, we argue it did not happen, we separate our clients from it, we blame others, and, frequently, we argue the conduct was not, in any event, wrong. In these roles, the lawyer must struggle with the substantive law as applied to the situation and also with the law as applied to her own conduct. What are the legal ramifications of her conduct regarding the alleged wrongdoing?[2]

At the risk of oversimplification, this issue usually involves three fundamental questions: 1) Who has authority to decide the institution's position and tell the lawyer how to respond? 2) When should the lawyer seek direction from a higher or different "constituent" within

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[1] An abbreviated laundry list of current "hot" issues on campuses would include alleged discrimination, assault by one member of the university community against another, embezzlement, hate crimes, overstatement of indirect cost recovery under federal grants, scientific misconduct, NCAA violations, violations of environmental laws, off-campus crimes by faculty and students, violations of noise and other neighborhood ordinances, theft or misuse of information stored in computers, and alcohol and drug abuse on campus.

[2] The law governing lawyers' conduct is state law. Most states have adopted variations of the Model Code of Professional Responsibility (1969) or the Model Rules of Professional Conduct (1983). At least thirty-four states have adopted the Model Rules, as amended. Illinois, New York, North Carolina and Oregon have adopted ethics rules that incorporate provisions of both the Model Code of Professional Responsibility (Model Code) and the Model Rules of Professional Conduct (Model Rules). Law. Manual of Prof. Conduct § 1:3 (1990). California has adopted its own quite different set of rules. See Rules of Professional Conduct of the State Bar of California. Despite these state law differences, many of the basic principles are the same. In this paper, I will refer primarily to the Model Rules, since they establish what may be considered a common law of professional responsibility. An additional significant source of the "common law" of professional responsibility is the American Law Institutes' (ALI) Restatement of the Law Governing Lawyers. The ALI has released five tentative drafts that deal with many of the confidentiality and the entity-client issues that this paper addresses. See Restatement of Law Governing Lawyers § 117 (Tent. Draft No. 3, 1990) (on disclosing confidential information) and § 212 (Tent. Draft No. 4, 1991) (on conflicts of interest in representing an organization).

the institution? and 3) To whom may the lawyer tell what she knows?[3] To answer these questions, the lawyer draws on three sources of law: the applicable rules of professional responsibility, the internal "law" of the college or university (including delegations of authority and other applicable policies) and the substantive law applicable to the specific conduct. Part I of this Article is a brief overview of how these three sources of law interrelate. Parts II through V analyze three hypotheticals. In each hypothetical, the university lawyer has knowledge of possible wrongdoing at the institution. The lawyer must decide what actions to take based on that knowledge. Throughout the discussion, unique ethical issues that university lawyers face are analyzed.

## I. OVERVIEW OF SOURCES OF LAW AND IDENTIFYING THE CLIENT

When wrongdoing is brought to the attention of the university lawyer, she must first identify the client. The Model Rules of Professional Conduct identify the entity as the university lawyer's client.[4] More precisely, "a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[5]

The next step is to identify who the "duly authorized constituent of the institution" is with respect to the specific legal matter at hand.[6] The university counsel should analyze the institution's delegations of authority. The lawyer should begin this analysis with the institution's

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[3] In the terminology of the Model Rules, the three questions can be restated as follows: 1. Who is the "duly authorized constituent" of the organization? (Rule 1.13(a)); 2. When should the lawyer take the issue of wrongdoing to a higher authority within the organization? (Rule 1.13(b)(3)); and 3. When may the lawyer decide for herself to tell third parties about the wrongdoing? (Rule 1.6).

[4] The lawyer for academic institutions may also represent the president, other officers, individual trustees, faculty and even students as long as there are no conflicts. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(e) (1983) ("A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7.") and Rule 1.7(a) ("A Lawyer shall not represent a client if the representation of that client would be directly adverse to another client . . . .").

[5] The entity theory is not new in the Model Rules. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-18 (1983). ("A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity . . . ."). The California formulation of the entity theory is appropriately ethereal ("In representing an organization, a member shall conform his or her representation to the *concept* that the client is the organization itself . . . .") CALIFORNIA RULES OF PROFESSIONAL CONDUCT 3-600(A) (1992) (emphasis added). For a general discussion of the entity theory, *see* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.7 (1985).

[6] The Model Rules definition of the entity client does not focus on the specific legal matter at issue, but clearly different employees are authorized to act with respect to different issues. The California Rules recognize this fractured nature of the entity-client. CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 3-600(A) (1992) ("the client is the organization itself, acting through its highest authorized officer . . . *overseeing the particular engagement.*") (emphasis added).

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Articles of Incorporation, by-laws or statutes,[7] official policies promulgated by the governing board or officers, and the university's custom and practice.[8] In many, if not most, cases, the entity client—the university—will have delegated its authority to several individuals or groups. Each individual or group will have authority over different aspects of the same problem. The lawyer may, therefore, need to work through various university policies and procedures on several overlapping levels.[9]

The search for the client becomes more complicated when wrongdoing is involved. Multiple "authorized constituents" may claim protection under the mantle of confidentiality and these constituents may act or refuse to act in a way that violates the law and is damaging to the institution. In these situations, the entity theory *requires* that the lawyer balance several considerations and "proceed as is reasonably necessary in the best interest of the organization." When appropriate, the lawyer may refer the matter to "higher authority in the organization."[10] Under the Model Rules, this obligation is mandatory. The

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[7] Lawyers for state institutions may be subject to unique ethical issues because state statutes regulate the issue of authority and who speaks for the institution. *See* MODEL RULES OF PROFESSIONAL CONDUCT pmbl. ("Under various legal provisions, including constitutional, statutory and common law, the responsibility of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships."); 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING, § 1.11:101 at 348 (2d ed. 1992).

[8] University lawyers regularly deal with "legal" issues relating to delegations of authority: Does the Vice President for Finance have the authority to sign the loan documents? Does the governing board have to approve awards of tenure or offers of employment before they are effective? The "who-speaks-for-the-client" issue in Rule 1.13 requires the same analysis, though the delegation for purposes of Rule 1.13 is frequently less formal and legalistic.

[9] This process of identifying the authorized "client" in a university is probably the most common and difficult "ethical" issue faced by university lawyers. Professor Robert O'Neil has addressed this issue in his paper from two vantage points—to whom is the university lawyer accountable and what expectations do the university constituencies have of the lawyer. The core of the difficulty—what separates universities from corporations—is the role of the faculty and the tradition of faculty governance and peer review. The faculty are to some extent employees, but in many respects they exercise management functions. *See* NLRB v. Yeshiva Univ., 444 U.S. 672, 100 S. Ct. 856 (1980). Further, the faculty acts through departments, colleges and committees and faculty "constituents" may take different and conflicting positions on the same issue. These conflicting voices cause difficulties both conceptually and practically for the lawyer who is trying to identify a "client" who can make decisions and who has the right to assert an attorney-client privilege.

[10] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(b) (1983). Rule 1.13(b) states:

> In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing

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institution's lawyer may not sit on her hands and defer to the "client"; she "shall" analyze the competing considerations and "shall" act in the "best interest of the organization."[11]

After proceeding through the internal chain of command, which includes referring the matter to the governing board of the university,[12] the lawyer may still not be satisfied with the institution's decision or investigation. The university lawyer may then need to decide whether to resign[13] or to go beyond the client to the public, a court, a regulatory body, or a third person. The lawyer may choose to resign *and* go beyond the institution. The action that the lawyer takes will depend upon the nature of the alleged violations and the strength of the allegations. These are the issues presented by Model Rule 1.6 and discussed by Father Robert Drinan[14]—when may a lawyer breach the duty of confidentiality and go public?[15]

Finally, interwoven with the entire ethical analysis is the substantive law of the matter. Rule 1.13 requires a lawyer to go up the chain of authority within the entity when the lawyer "knows" that the entity-client is about to violate the law. In addition, Rule 1.6 allows the lawyer to go public when the lawyer "reasonably believes" such action is necessary to prevent a "criminal act."[16] Consequently, the lawyer must analyze the underlying legal concepts and consider the strength of the case before she can decide what the ethical rules require. The

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> information relating to the representation to persons outside the organization. Such measures may include among others: 1) Asking reconsideration of the matter; 2) Advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and 3) Referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

*Id.*

[11] *See id.*

[12] *Id.* at Rule 1.13(b)(3).

[13] *Id.* at Rules 1.13(c) and 1.16.

[14] *See* Robert F. Drinan, *Lawyer-Client Confidentiality in the Campus Setting*, 19 J.C. & U.L. 305 (1993).

[15] Rule 1.6 as promulgated allows (but does not require) the lawyer to go public if the lawyer "reasonably believes" that revealing confidential information is necessary "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial harm . . . ." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1983). In its original form, Rule 1.6 also permitted the lawyer to reveal confidential information in several other circumstances, including: 1) to prevent a "fraudulent act that the lawyer believes is likely to result in . . . substantial injury to the financial interest or property of another . . . ."; 2) to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services have been used . . . ."; and 3) "[t]o comply with . . . other law." As Father Drinan has discussed, the ABA rejected these provisions, though it has been argued that to some extent they must be implied in the Rules. *See* HAZARD & HODES, *supra* note 7, § 1.6:109 at 142.10-143.

[16] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.13(b) & 1.6(b) (1983), respectively.

lawyer may consider whether a violation of law occurred and whether the "client's" conduct was criminal. Thus, the merits of the issue and the quality and accuracy of the lawyer's analysis directly affect the ethical and professional judgments the lawyer must make.[17]

## II. SCIENTIFIC MISCONDUCT

*HYPOTHETICAL: A professor (Professor) asks a university lawyer (Lawyer) to review an application to the National Institutes for Health (NIH) for a federal grant renewal. Professor tells Lawyer that she believes the data reported in the application is roughly accurate but she has lost the laboratory results and "estimated" the numbers. Professor informs Lawyer that she included a salary for her researcher-husband and a home computer as part of the grant. The application does not disclose these facts. While Lawyer is reviewing the application, Lawyer receives a call from a graduate student who works in Professor's laboratory. The graduate student says Professor reprinted in the grant-renewal application only research data that help Professor's theory. The graduate student also tells Lawyer that the research results include other inconsistent data. The student threatens to "blow the whistle" on this "fraud." The student asks that Lawyer not reveal his name.*

*Lawyer raises these issues with Professor. After asking for the name of the graduate student, Professor says that applicants are not obligated to disclose facts related to specific expenditures; Professor has not manufactured data; Professor did not ignore adverse data; and, in any event, Professor's selection and presentation of data are matters of academic freedom.*

*Lawyer takes these issues to the Vice President for Research. The Vice President for Research tells Lawyer that he believes Professor has acted properly and he intends to sign the grant proposal. What should Lawyer do?*

*DISCUSSION*: First, Lawyer must identify the client. The institution is certainly Lawyer's client, and it speaks through its authorized representatives.[18] The proper representatives will vary depending on the matter. In this hypothetical, Lawyer faces two separate legal issues: (1) federal contract advice regarding the grant, and (2) advice regarding possible scientific misconduct.

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[17] The overlap of a lawyer's analysis of the merits with her analysis of her ethical obligations creates a fundamental tension in our adversary system when the lawyer is faced with client wrongdoing—the lawyer has to decide how sure she is that her client is wrong. If the lawyer misjudges the facts or law, she may either reveal confidential information or resign. Thus, when her belief of wrongdoing is in fact wrong or not reasonable, she damages her client and may violate the Rules and be subject to disciplinary action. This is one of the issues raised in the debate over the proper role of lawyers in the savings and loan crisis. *See* Nancy Rutter, *Dirty Hands*, 12 CAL. LAW. 30 (Jan. 1992) ("With federal regulators closing in, thrift executive Charles Keating struggled desperately to save his financial empire. Did the lawyers who helped him ignore fraudulent acts that left Lincoln Savings in ruin? Or was their work reasonable, prudent, competent and ethical?").

Lawyer must consider who the authorized representative is with respect to each issue. Lawyer, therefore, must analyze how the institution delegates authority. The institution may delegate authority through by-laws, policies of the governing board, or written administrative policies. Lawyer may also infer the delegation from the custom and practice of the institution.

On the federal-grant issues, let us assume the Trustees have a written policy that delegates the authority to sign federal grants and contracts to the Vice President for Research. The Vice President is therefore one person authorized to sign these grants and applications for the university. Through custom and practice, however, the institution also delegates authority to Professor to initiate grant proposals, to do the research, to report on results, and to decide how the research is conducted. If Lawyer advises the institution about language in the application or contract, Lawyer will likely consult the Vice President as the authorized constituent. If Lawyer has comments on the specifics of the grant, Lawyer may reasonably view Professor as the authorized representative of the university.

Lawyer should also consider the misconduct issues. The university should have a policy on scientific misconduct that outlines the process for reviewing allegations of misconduct.[19] We will assume for purposes of the hypothetical that the Vice President for Research is the person authorized to review and decide the scientific-misconduct allegations.[20]

The university may not be Lawyer's only client. Lawyer must analyze whether Professor is a co-client. Professor may have a direct interest in patent rights, a property interest in research data, and an academic freedom interest in autonomous research. Custom and practice may lead Professor to believe that Lawyer represents Professor's interests as well as the institution's. For all of these reasons, Professor may be an individual client—distinct from Lawyer's representation of Professor as an agent of the institution. Absent a conflict of interest, Lawyer may advise both Professor, in Professor's individual capacity, and the Vice President, as an authorized representative of the university.[21] If it is "apparent" that the interests of the two clients are adverse, however, Lawyer must inform Professor that Lawyer represents the institution and cannot advise Professor as an individual.[22]

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[18] Model Rules of Professional Conduct Rule 1.13 (1983).

[19] The federal regulations require such a policy. *See* 42 C.F.R. § 50.103 (1991).

[20] In practice, the delegation and related "who is the client" issues are likely to be more complicated, as the institution probably has a faculty committee to review issues of scientific fraud and there may be two or three levels of administrative review (the department head, Dean, faculty committee, etc.).

[21] *See* Model Rules of Professional Conduct Rules 1.13(e) & 1.7 (1983).

[22] Model Rules of Professional Conduct Rule 1.13(d) (1983) ("In dealing with an

In this hypothetical, Lawyer would have to decide whether and when to give this type of warning to the Professor. University officials or faculty members may consult with the institution's counsel and disclose evidence of possible personal wrongdoing. The initial conversation may create a personal attorney-client relationship between the lawyer and the institution's agent. The rules of legal representation could prohibit the Lawyer from representing the institution "against" the Professor. It is not reasonable, however, to require that university counsel tell every official or faculty member consulting the lawyer that the lawyer represents the institution, is not the individual's lawyer, and will not hold in confidence what the individual tells the lawyer.

If Professor tells Lawyer about the data estimates before Lawyer clarifies Lawyer's role as the institution's attorney, this should not create a personal attorney-client relationship that would require Lawyer to hold in confidence the information from Professor. On the other hand, if Lawyer receives a call that alleges specific wrongdoing, Lawyer should inform Professor that Professor should not expect their discussions to remain confidential. Lawyer should also make Professor aware that Lawyer represents the institution and that the institution's interests may be adverse to Professor's.

In this hypothetical, Lawyer consults with the Vice President, and the Vice President tells Lawyer that they should honor Professor's choices on how to present research and put together a grant request. The Vice President also plans to sign the grant application. Should Lawyer accept this decision?

To decide this, Lawyer needs to know the substantive law and also have an understanding of academic norms and procedures. The hypothetical presents three issues: 1) use of grant money; 2) reliance on estimated data; and 3) the allegation of specific scientific misconduct in the selection of data.

In examining the use of grant money, Lawyer must find out whether federal grant regulations require disclosure of payments to related parties and whether they regulate use of federal money for equipment used in the home. If disclosure is not required by the regulations, but Lawyer believes failure to disclose could lead to poor publicity, Lawyer should at least argue the point with the Vice President.[23] Ultimately, Lawyer should probably accept Professor's and the Vice President's decision. The client's conduct does not violate the law or an obligation to the university. In these circumstances, Rule 1.13 does not require further action. Of course, there is no ethical prohibition on Lawyer taking the issue to a higher authority, such as the President,[24] but this

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organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.").

[23] One of the blandest options suggested by Rule 1.13 is to "ask for reconsideration."

[24] *Id.* Nothing in Rule 1.13 prevents a lawyer from going to a higher officer as long as the lawyer has not established an attorney-client relationship with a "lower level"

is entirely a judgment call. The course of action depends on the role Lawyer has developed and chooses to play in the institution.

Second, the issue of relying on estimates rather than hard data involves a mix of "academic" and "legal" issues. If, under the circumstances, Professor and the Vice President believe that relying on estimates in a grant proposal is academically acceptable, this may be enough to control the decision. There is [illegible] strong component of academic freedom in developing and presenting research results. Lawyer should recognize and defer to the more competent decisionmakers. The issue also requires legal analysis. Does use of estimated data constitute "misconduct in science,"[25] when the data provider does not inform the reader that research is based on estimates? The NIH regulations might require further inquiry. In addition, does the grant application contain "false" or "fraudulent" statements which may expose the institution to a *qui tam* or Justice Department lawsuit?[26]

Lawyer is not required to do anything further unless Lawyer "knows" that the institution would violate the law if it submitted and obtained the grant. Even then, Rule 1.13 only mandates that Lawyer consider the "seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved" and act "in the best interest of the organization."[27] Based on these facts, it is unlikely that Lawyer is *required* to challenge the decision of the academics to whom the institution delegated authority to decide these

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individual and received information in confidence. Indeed, in some circumstances, the Rules may require a lawyer to offer unsolicited non-legal "business" advice, and they unquestionably permit it. A lawyer has a duty to provide "competent representation" (MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983)), and this should include advice on public relations issues relating to legal matters. Further, a lawyer should act with "commitment and dedication to the interests of the client," which includes looking out for all of the client's interests, not just strictly legal concerns. *Id.* at Rule 1.3 commt. Even more clearly, Rule 2.1 permits a lawyer to "refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation." *Id.* at Rule 2.1. All of these rules, as well as the fractured nature of the university client, suggest that the lawyer should play an activist role in counseling and resolving problems, even when the advice is not, strictly speaking, legal. If the lawyer adheres too closely to the old line between "business advice" and "legal advice," she fails adequately to represent the entity-client.

[25] "Misconduct in science" is defined as "fabrication, falsification, plagiarism or other practices that seriously deviate from those that are commonly accepted within the scientific community for proposing, conducting, or reporting research. It does not include honest error or honest differences in interpretation or judgments of data." *See* 42 C.F.R. § 50.102 (1991). A university must inquire "immediately into an allegation or other evidence of possible misconduct." 42 C.F.R. § 50.193(d) (1991).

[26] *See* False Claims Act, 31 U.S.C. § 3729 (1988) ("Any person who . . . (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government . . . is liable to the United States . . . for damages.")

[27] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(b) (1983).

matters. Restated, Lawyer will not be subject to professional disciplinary action for letting the matter rest with the Vice President.

Should Lawyer be an activist adviser and, as a matter of professional judgment, bring this matter to the President? If the President must consider every proposed presentation of data for a federal grant, the President will be unable to do anything else. This misuse of time is undoubtedly not in the "entity's" best interest. To become embroiled in a NIH investigation, or a lawsuit under the False Claims Act, however, is damaging to a university. The Lawyer's decision will likely be based on matters not presented in the hypothetical—for example, how sound is the academic explanation of the propriety of relying on estimates?

Third, what should Lawyer do with the whistleblower's information? A student cannot expect to be Lawyer's client. Therefore, Lawyer is not ethically restricted from disclosing the student's name to the Vice President or the Professor.[28] But what if—despite the allegations—Vice President refuses to conduct an inquiry? The applicable regulations require that the institution undertake an "inquiry" *if* the allegation involves possible misconduct.[29] The issue then becomes whether the allegation of data selection fits the definition.[30] This is a mixed legal/scientific/academic judgment call that may place Lawyer squarely at odds with the institution's representatives. If Lawyer concludes that an inquiry is legally required, Lawyer must consider whether under Rule 1.13 Lawyer should ask for a separate legal opinion[31] or go to a higher authority within the institution.[32]

To push the hypothetical further, let us assume Lawyer advises the President that the law or regulations require an inquiry, but the President refuses to act. Should or may Lawyer become a whistleblower and inform the NIH of the confidential information? In our hypothetical, Lawyer has knowledge only of an allegation of misconduct and a failure of procedure. Lawyer does not have actual knowledge of a fraud. The ethical rules would not require Lawyer to go public but would, in fact, prohibit it.[33]

If, however, Lawyer has actual knowledge of fraud,[34] a choice whether to go public with the information may arise. This depends on the applicable rules of professional responsibility. Under the Model Rules, Lawyer probably may not reveal confidential information, even if he knows that the institution or its representative is about to commit a criminal act that will cause financial harm. Some states have recognized exceptions to this strict rule. First, to the extent Lawyer participated in the grant process, the ethical code may permit Lawyer to reveal confidential information in order to prevent the fraud.[35] Second, even if Lawyer did not participate, Lawyer may conclude that a likelihood of serious financial harm to others exists.[36] In the few states that recognize these exceptions, Lawyer may also have a right to go public to prevent criminal fraud against the government.

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[28] But note that one of the requirements of a university's policy on scientific misconduct is that it protect "to the maximum extent possible, the privacy of those who in good faith report apparent misconduct." *See* 42 C.F.R. § 50.103(d)(2) (1991).

[29] *Id.* § 50.103(d)(1) (1991).

[30] *Id.* § 50.102 (1991).

[31] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(b)(2) (1983).

[32] *Id.* at Rule 1.13(b)(3).

[33] Rule 1.6, only allows a lawyer to reveal confidential information relating to a crime that is likely to result in physical harm. This is clearly not the case in the hypothetical. Disclosure would likewise not be permitted under the original text of Rule 1.6(b)(2) because Lawyer does not have knowledge of "fraud," only a failure of procedure and a violation of regulations. *Id.* at Rule 1.6.

[34] *See* 18 U.S.C. § 287 (1988).

## III. Sexual Harassment

*HYPOTHETICAL: The university denies tenure to a female assistant professor (Professor). Professor seeks to overturn the tenure denial and files a grievance. The Dean is the formal respondent in the institution's grievance procedure. As one basis for attacking the denial of tenure, Professor alleges she had a six-month affair with the Dean. The affair became "unwelcome" and made her working conditions unpleasant. When she broke off the relationship, the Dean retaliated by voting against her tenure. Professor also alleges that the Dean has asked three students for dates and has harassed them. The Dean publicly denies the allegations. The Dean calls the institution's lawyer (Lawyer) and asks to meet. In the initial meeting, the Dean confides in Lawyer that Professor and the Dean had a relationship. The Dean insists, however, that the relationship was consensual, denies the harassment of students, and says that, in any event, the allegations are irrelevant to the tenure decision. What should Lawyer do?*

*DISCUSSION*: When resolving issues of professional responsibility, lawyers essentially represent themselves as their own client. The rules provide a framework for analysis, but lawyers must make numerous individual decisions and judgment calls while they attempt to determine the proper course of conduct.[37] Because the ethical rules give lawyers autonomy to choose how to act, it is useful to analyze this factual situation by describing a hypothetical dialogue that a lawyer might have with herself.[38]

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[35] The earlier version of Rule 1.6 allowed a lawyer to reveal confidential information to "rectify the consequences" of a fraudulent act in which the lawyer's services were used. This provision was deleted in the ABA Model Rules, but may exist in some states directly or by implication. See HAZARD & HODES, *supra* note 7, § 1.6:110, at 143.

[36] This exception was also deleted in the final form of the Rule. *See id.* § 1.6:109 at 142.12 n.6.

[37] The Preamble of the Model Rules states the following: "Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules." MODEL RULES OF PREOFESSIONAL CONDUCT pmbl. (1983).

Q. Who is the client?

A. That's easy. The client is the entity.

Q. But to whom do I talk? Who is the constituent through whom the client acts?

A. The institution pays your salary; let's figure out who speaks for the institution.

Q. Has the governing board delegated authority to a particular individual?

A. The governing board has delegated authority to the faculty on academic matters, to the President on administrative matters, and to the Equal Employment Opportunity officer on issues of discrimination.

Q. To whom do I look?

A. Let's start with the tenure grievance; that's why the Dean came to you.

Q. The Board has no policies in this area, but the President has approved a "Policy on Tenure Grievances" that declares that the Dean is the respondent. Then, is the Dean the client? And if so, is the Dean my client individually or merely as a representative of the institution?

A. The Dean is my client, but only as a representative of the institution and only for defense of a claim against the institution. But these facts also involve an allegation of personal wrongdoing by the Dean.

Q. Who is the client for purposes of dealing with that alleged wrongdoing? Have you already created an attorney-client relationship with the Dean by meeting with him and learning confidential information?

A. I don't think so. When we first met I said I represented the institution and could not keep confidential what the Dean told me.[39] If I had not told this to the Dean, I probably would have to hire outside counsel to represent the institution.

Q. Does the institution have a policy on sexual harassment?

A. Yes, and it directs the Equal Employment Opportunity (EEO) office to investigate any allegations.

Q. Does that mean that the Equal Employment Opportunity officer is the client for purposes of a sexual harassment investigation?

A. Yes, as the institution's representative.

Q. O.K., then you can talk to the Equal Employment Opportunity officer and advise the officer about the sexual harassment allegation.

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[38] See HAZARD & HODES, *supra* note 7, § 502 at lxxxii ("Whatever judgment the lawyer makes, and whatever standard outwardly is applied, the process of coming to judgment will in fact be an internal moral dialogue and a struggle of conscience.").

[39] See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(d) (1983); HADZARD & HODES, *supra* note 7, § 1.13:502.

A. I have already done that. The Equal Employment Opportunity officer talked to the Dean but refuses to talk to the Professor or the students. The Equal Employment Opportunity officer also believes the Dean is innocent and refuses to investigate further.

Q. Has the institution violated the law when it refused to investigate the sexual harassment allegation?

A. Maybe not, but our institution's policy mandates that the EEO officer must investigate allegations of sexual harassment.[40] The EEO officer has violated an obligation to the Institution.[41]

Q. Do I have an obligation to go beyond the Equal Employment Opportunity Officer? Must I go to a higher authority such as the President?

A. That depends on your judgment of the clarity of the legal requirement, the seriousness of the wrong, and the likelihood of the harm to the educational institution (or likelihood of further harm).

Q. Doesn't the university have a very strict policy that it will investigate allegations of sexual harassment? And isn't the EEO officer *a friend* of the Dean's?[42]

A. I think you are telling me that I should not accept the EEO officer's decision. In any event, I don't think there is a rule telling me I can't take it further if I don't like the initial decision. I think I'll go to the President. If we don't at least investigate, we'll probably get bad publicity in the media. It increases our potential liability to Professor and the students. In addition, if the allegations are true, current and future students may be victims.

Q. What if the President refuses to act?

A. My judgment is that I should accept the President's decision. This is not such a clear case that I must go to the Board or resign.[43]

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[40] The EEOC Guidelines provide that a failure to investigate may cause the employer to be liable when harassment is proven and the employer takes no corrective action. *See* 29 C.F.R. § 1604.11(d)-(e) (1991). *See also* Barbara L. Schlei & Paul Grossman, Employment Law Discrimination 153 (2d ed. Supp. 1989). Whether there is an independent duty to investigate is less clear; in other words, unless state law is more specific, a plaintiff might not be able to state a claim for relief based on a refusal to investigate independent of the underlying harassment.

[41] Rule 1.13(b) requires the lawyer to consider whether to consult a higher authority when a client representative acts in a way that is a "legal obligation to the organization" or a "violation of law." Assuming the institution policy requires the EEO officer to investigate, a refusal to act violates her obligation to the entity. Given the effect of a failure to investigate on the institution liability, this violation is likely to "result in substantial injury to the organization." Model Rules of Professional Conduct Rule 1.13(b) (1983).

[42] Under Rule 1.13(b), the lawyer must consider, among other factors, the "apparent motivation of the person involved" and the "policies of the organization concerning such matters." *Id.*

[43] Under Rule 1.13(c), the lawyer may resign under Rule 1.16 if the highest authority of the client that can act insists upon action that is a violation of law. *Id.* at Rule 1.13(c). This provision notably does not include action that is a violation of an obligation to the

The whole issue of when a consensual relationship is "unwelcome" and constitutes harassment is unclear.[44] None of the three students has complained. Maybe the EEO officer's conversation with the Dean is a sufficient investigation.

Q. Have you considered going public?

A. Yes, to protect my own reputation, but I don't believe I can ethically do that.[45] There is no real physical harm to third parties[46] that might require me to warn them and no one has asked me to participate in an illegal act.[47]

Q. O.K., if you have accepted the university's decision not to investigate the harassment charge, will you represent the Dean as the institution's representative in the internal proceeding?

A. There is no written policy on that issue. The institution's practice is that university counsel provides legal services to the respondent in internal tenure cases. In that sense, the institution has asked me to represent the Dean as its representative, so I think I should.

Q. But what if the faculty panel that presides over the tenure grievance hearing asks for your advice, or the President asks for assistance when the recommendation of the panel goes to the President for a final decision?

A. Then I may be foreclosed from giving it, either because I would have confidential information from the Dean, or because a conflict of

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organization. Since the failure to investigate is more a violation of the entity's own policies than it is an independent wrong, arguably the lawyer may not resign under the provisions of Rule 1.16. In most respects, this is not a serious limitation on the lawyer's ability to withdraw because 1.16(b) allows discretionary withdrawal if there is no "material adverse effect" on the client and the lawyer can always withdraw (or, in the case of an in-house lawyer, quit) with mutual agreement.

[44] *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68, 106 S. Ct. 2399, 2406 (1986) where the court stated: "But the fact that sex-related conduct was 'voluntary', in the sense that the complainant was not forced to participate against her will, is not a defense . . . . The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"

[45] It is clearly improper for a lawyer to reveal client confidences just to protect the lawyer's reputation.

[46] The "criminal bodily harm" exception in Rule 1.6 is not likely to occur in educational institutions, though one can hypothesize circumstances where it might fit. For example, if a university official knows that a university actor (including a student) is about to commit a crime—such as assault and battery or rape—that would cause substantial harm and the university fails to act to prevent the criminal act, the lawyer might believe the client is guilty of criminal complicity which would allow the lawyer to go to outside authorities. "Date rape" or an egregious case of sexual harassment might fit this pattern. Second, a lawyer for an academic-institution hospital may disagree with his client on "right to life" issues which could implicate both criminal conduct and bodily harm. *See infra* p. 329 (third hypothetical in text).

[47] Rule 1.6(b)(2) would allow the lawyer to reveal confidences if necessary to establish a defense to a claim against the lawyer, but the provision of the proposed Rule that would allow the lawyer to reveal client confidences to "rectify the consequences of a client's criminal or fraudulent act" for which the lawyer's services were used was deleted. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1983).

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interest would exist. I have to admit, however, that I have never understood the exact ethical problem of this kind of multiple representation. If I have always represented only the entity, not the Dean personally, then by definition if I talk to the President or a committee I have not shared confidential information outside of the entity. Also, no legal conflict of interest exists when I have only one client. But it would certainly look unfair to the grievant and might make the final decision subject to attack on due-process or breach-of-contract grounds.

Q. Let's summarize what you have decided. You have identified the highest-ranking officer who acts for the client on sexual harassment matters. You disagree with her decision not to investigate, so you will go to a higher authority—the President. If the President chooses not to act, you do not believe the circumstances warrant going to the governing board or outside the institution. Finally, you have decided that you will represent the Dean in the grievance proceeding and will not represent either the committee or the President.

A. Yes. But could I be disciplined by the State Bar or fired for these choices?

Q. Probably not, on these facts. But if you judge incorrectly and go public when you should not, you would have violated the duty of confidentiality and could be disciplined. If you do not take the issue of a refusal to investigate to a higher authority, you might have violated the mandatory nature of Rule 1.13 and could be subject to discipline for that failure. I seriously doubt, however, that you would be subject to disciplinary action based on these facts. Finally, if you go public and are fired, you will have a very difficult wrongful discharge case.[48]

A. Well, happily, I believe the Dean. The affair was voluntary *and* welcome. It was irrelevant to the professor's performance. The Dean didn't harass students. Even though I wish the EEO officer would investigate, and I will urge the President to order a further investigation, I can live with the decision.

Q. What if the President orders an investigation and the EEO officer asks for your assistance while you are representing the Dean in the tenure grievance?

A. To defend the charges of sexual harassment levied against him, the Dean would have to hire his own counsel. I should also provide or hire separate counsel for the EEO officer on behalf of the institution. It is just too messy. Even if I explain to both the Dean and the EEO officer that I represent the entity and neither of them personally, I do not think they will fully understand the distinction. I do not want to create a possible defect in the fairness of the investigation.

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[48] *See* Balla v. Gambro Inc., 584 N.E.2d 104 (Ill. 1991) (holding that an in-house lawyer may not bring an action for retaliatory discharge). *See also* Grace M. Giesel, *The Ethics on Employment Dilemma of In-House Counsel*, 5 GEO. J. LEGAL ETHICS 535 (1992).

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## IV. INTERCOLLEGIATE ATHLETICS

> *HYPOTHETICAL: A lawyer (Lawyer) participates in an NCAA investigation of a college or university's football program. The Athletic Director (AD) tells Lawyer that three years earlier the Coach provided illegal steroids to his players. The AD tells Lawyer that AD received an anonymous phone call last month alleging that the coach (Coach) was again providing steroids to his players. AD instructs Lawyer not to reveal this information to anyone. The statute of limitations for Coach's possible criminal conduct and any tort action is four years. The NCAA has stated that its inquiry is limited to a two-year period. What should Lawyer do?*

*DISCUSSION*: NCAA investigations place unique professional and ethical demands on a university lawyer. Although the answers are ambiguous, Lawyer must decide what is legally required of the institution. NCAA rules do not have the force of either civil or criminal laws. By its membership in the NCAA, the institution, as the client, has agreed to report rule violations and cooperate in the related investigations. The institution has a contractual obligation to the NCAA. Most institutions also would say that full compliance and cooperation are matters of institutional policy. Coaches and other university employees have an obligation to the institution to investigate and report violations.

Also, an NCAA investigation can cause serious financial harm to the institution, lead to loss of employment for employees, damage the careers of student-athletes, and result in sanctions that are the equivalent of civil damages and criminal penalties. Further, the "rules" are often unclear or senseless, the facts may be messy, and it is frequently unclear whether a violation has been committed. The institution and its lawyer swear allegiance to promoting a clean program. Such a broad commitment ignores potentially serious professional and ethical choices and offers little guidance to the lawyer. The lawyer wrestles with factual and legal uncertainty and competing interests. In ambiguous situations, should the lawyer err on the side of reporting everything or err on the side of "protecting" the institution and its employees?

Second, the lawyer's obligation to the university may cause her to report an employee—for example, a coach—whom the lawyer would consider a client under other circumstances. The prevalence of ambiguous facts and cloudy rules makes the conflicts between co-clients—the university and the employee—harder to resolve.

Third, on the facts of this hypothetical, the alleged violations may concern important health and safety interests of third parties. Are current students at risk? The lawyer must also consider the duty to students.

Finally, the institution's interests in this area, as with many others, include public-relations questions. The entity may not want to publicize problems if it does not have to, but the publicity that can stem from leaks may be worse. The university may, therefore, decide to "go public" with allegations in order to present a better "image." What about the privacy rights of students, employees and boosters who may be falsely charged by the press? The views provided by the press can be significantly more damaging when reporters believe erroneously that NCAA rules are actually laws.

Faced with these confusing obligations and concerns, Lawyer in our hypothetical must first decide whether to report Coach's previous wrongdoing to an authority higher than the AD. Lawyer could take the issue to the President. The NCAA, however, has stated it will not review information more than two years old.[49] Thus, Lawyer could reasonably conclude that Coach's past distribution of steroids and the AD's decision to do nothing (vis-á-vis the NCAA) would be neither a current violation of a legal obligation to the institution nor a current violation of law attributable to the institution.

Should Lawyer go to the President with evidence of Coach's past, but still actionable, violation of state law? If Lawyer has no knowledge that Coach is currently engaged in wrongdoing that is harmful to third parties or violates the institution's interest, neither Rule 1.6 nor Rule 1.13 suggests further action. Both sections deal with ongoing or future wrongdoing. Nevertheless, the institution, and not Coach, is the client. No rule of law or ethics restricts Lawyer from taking the matter to the President if, in Lawyer's view, the President would want to know about the alleged conduct and the institution might want to take action in this matter. The institution would probably have cause to fire Coach for such past conduct. In addition, based on the substantial harm to the institution that would occur if Coach were to repeat the conduct, Lawyer probably should exercise her professional discretion and inform the President.

In our hypothetical, we also have an anonymous call alleging that Coach is currently providing drugs to student-athletes. What should Lawyer do with this information? If Lawyer confirmed that the Coach was dispensing illegal drugs to students and the AD refused to act, Lawyer would be required under Rule 1.13 to take the matter further. Lawyer would have to inform the President and then the governing board. In the event that the institution—through the President and the governing board—decides not to act, the lawyer could[50] probably violate the duty of confidentiality and notify the criminal authorities under even the most restrictive interpretation of Rule 1.6.[51]

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[49] This hypothetical obviously does not describe a typical NCAA investigation as it deals more with drug use than with NCAA "extra benefits" rules. But the inclusion of facts relating to drugs allows us to consider the crime and physical harm exception to Rule 1.6.

[50] Some state ethics rules might require the lawyer to reveal confidential information to stop the criminal conduct. *See, e.g.*, ILLINOIS RULES OF PROFESSIONAL CONDUCT 1.6(b) (1992) ("A lawyer *shall* reveal information about a client to the extent it appears necessary

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But what if the AD decides not to investigate the anonymous call? Must Lawyer challenge this decision within the entity? Under the rules of professional responsibility, the answer is probably "no." The lawyer does not have knowledge[52] that Coach is acting in a way that violates the law. Unless the institution is under a legal duty to investigate an allegation of drug use, the AD is not violating the law if he does not investigate.[53] In addition, lawyer probably cannot "reasonably believe" that the coach is about to commit a criminal act that is "likely" to result in substantial bodily harm based only on an anonymous rumor.[54]

Lawyer's professional, but non-legal, opinion may be that the institution should investigate the rumor. Given Coach's past history, the prevalence of drugs in these circumstances, the age of the student-athletes, and the spotlight in which big-time university athletic programs operate, Lawyer could reasonably decide to push aggressively for an investigation. Lawyer certainly will not breach an obligation of confidentiality to the AD if Lawyer asks higher authorities to investigate the allegations. The decision to take the issue further within the organization is discretionary. It is allowed by the rules, but not required.

In another scenario, the issues of unlawful conduct and an administrator's refusal to act could be more ambiguous. Let us assume, for example, that two athletes file a "formal" complaint with the AD's office and allege current drug use and Coach's involvement. The AD asks Lawyer to help investigate. Together they talk to Coach. Coach denies the charges and says he kicked the students off the team because of their drug use. The AD believes Coach. Lawyer believes the students and worries that the AD is protecting Coach. What should Lawyer do?

These facts highlight one of the fundamental ethical decisions lawyers face. If Lawyer "knows" of unlawful conduct or "reasonably believes" action is necessary to protect a third party from physical (or financial) harm, the rules give Lawyer some guidance and may free the lawyer from the traditional strictures of confidentiality. Our entire training and experience as lawyers, however, tell us that we "know" very little, that facts are not immutable, that there are two sides to most issues, that clients deserve the right to argue their position, and that the adversary process, not the lawyer, should decide whether certain conduct is lawful or whether it even occurred.[55]

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to prevent the client from committing an act that would result in death or serious bodily harm.") (emphasis added).

[51] But see CALIFORNIA RULES OF PROFESSIONAL CONDUCT 3-600 and BUSINESS & PROFESSIONS CODE § 6068(e) (1992) imposing a standard of absolute confidentiality and providing that resignation rather than "going public" is the lawyer's ultimate option.

[52] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(b) (1983).

[53] AD may be violating an obligation to the entity, however, which would then require further analysis by Lawyer under Rule 1.13(b). *Id.*

[54] *Id.* at Rule 1.6.

[55] *See* HAZARD & HODES, *supra* note 7, § 403 at lxxvii:

If Lawyer decides she "knows" Coach is lying, the rules allow her to proceed to a higher authority and, in some circumstances, to "go public." The rules offer no advice on the threshold issue—what is the truth? What do we "know?" If Lawyer disagrees with the AD—the authorized delegate of the client—and blows the whistle on Coach, Lawyer may be less "ethical" than the lawyers who know they may be wrong, who disagree with but respect an AD's judgment, and decide to accept AD's decision. For this critical judgment call, the rules of professional responsibility offer a framework for analysis. They may offer a defense to a charge of misconduct, but they do not specify how lawyers should act.

Ultimately, what the lawyer "knows" or "reasonably believes" is more the product of our human experience, our values and our analytical training than it is of the legal rules of professional responsibility.

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The notion that lawyers can 'know' the reality of a situation goes against the grain of many lawyers' conception of themselves. Lawyers are trained in disbelief, or at least unbelief or suspended belief, and are required to act in that frame of mind in many of their professional duties. The responsibility for unbelief arises for both the advocate and the office lawyer.

# V. SELECTED NACUA CONFERENCE OUTLINES

1. "Academic Discipline and Dismissals," by David S. Taylor.

2. "Disciplining the Student," by Elsa Kircher Cole.

3. "Academic Dismissals of Students in Professional Schools," by Pamela J. Bernard.

4. "Student Discipline: Rights and Responsibilities," by Nancy S. Footer.

5. "Students in Professional Schools," by Julie Gross Adelson

# ACADEMIC DISCIPLINE AND DISMISSALS

October 3, 1992

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## I. Introduction

The topic of academic discipline and dismissals covers a full gamut of possibilities which might confront a college/university administrator or attorney. The potential situations encountered could range from a contested grade up to revocation of a degree. This particular segment will deal with academic dishonesty and grades and grade appeals, while the second segment will deal with evidence/procedures and degree revocation. However, an overview of the entire topic of academic discipline and dismissals is appropriate at the outset.

### A. Scope of issue

Protection of the academic integrity of an institution results in the establishment of academic standards as well as ensuring that an individual is accomplishing those standards on his/her own. The difference between the institution's perspective and the individual's perspective regarding such standards usually results in some type of grievance or disciplinary process which occasionally becomes a legal matter wherein a court is asked to resolve the dispute.

#### 1. Academic dishonesty

The two terms generally associated with academic dishonesty are "cheating" and "plagiarism." When these types of violations of academic standards occur, the process, and subsequent penalties for dealing with such, needs to be clearly outlined.

#### 2. Grades and grade appeals

Grading or evaluation of a student's academic work or performance is the standard manner of certifying accomplishments in a given academic subject or field. When the student disagrees with the grade or evaluation given by a faculty member, then the matter of grievance or appeal procedures come into play.

3. Academic dismissal

The result of not meeting a certain academic standard; i.e., a specific grade point average, could result in an academic dismissal. Also, the outcome of a cheating or plagiarism violation might be academic dismissal as well. It is usually at the point of dismissal that a person would feel sufficiently deprived to bring legal action. Usually, the higher the degree being pursued, the greater the likelihood of using legal channels since a good number of court cases are related to dismissals or non-granting of degrees at the professional school level.

a. Program

An academic dismissal could be from a specific program within an institution. In this instance, a student is eligible to continue at the institutional level but not in the particular program in which the student was enrolled at the time of dismissal; e.g., education, nursing, etc.

b. Institution

An academic dismissal could also be from the institution. In this instance, a student is ineligible for re-enrollment for a specified period of time or indefinitely.

B. Terminology related to issue

In nearly all court cases related to academic discipline, academic dismissals or grade appeals, two phrases consistently leap forth: "due process" and "arbitrary and capricious."

1. Due process

In the landmark case, Dixon v. Alabama State Board of Education, 294 F.2d 150. United States Court of Appeals, Fifth Circuit, 1961, the court concluded: "In the disciplining of college students there are no considerations of immediate danger to the public, or of peril to the national security, which should prevent the Board from exercising at least the fundamental principles of fairness by giving the accused students notice of the charges and an opportunity to be heard in their own defense." Until the Dixon v. Alabama case, due process in higher education was minimal or non-existent. This case clearly established the constitutional right to procedural due process for students. While there may be differences in the due process required for academic related matters versus conduct violations, many cases in the academic arena are tried on the basis of failure to provide due process.

2. Arbitrary and capricious

In many instances of judicial review in academic matters, the court has tried to determine whether there was a basis for the academic judgment or action. If there appeared to be arbitrary or capricious behavior on the part of the institution, the court was provided with greater cause to intervene.

C. Legal precedent re: academic related issues

1. Reluctance of courts to interfere in academic matters

In most instances, the court will not attempt to substitute its judgment for one made in the academic arena. However, where it appears there has been lack of due process or arbitrary and capricious behavior, the court may decide in favor of the student. In Regents of the University of Michigan v. Ewing, 106 S.Ct.507. United States Supreme Court, 1985, the court stated: "When judges are asked to review the substance of a genuinely academic decision, ...they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."

Furthermore, case law indicates that a student must exhaust all administrative remedies prior to court action (Martin v. Stone, 759 F.Supp. 19. United States District Court, District of Columbia, 1991; and Florida Board of Regents v. Armesto, 563 So.2d 1080. District Court of Appeal of Florida, First District, 1990.)

2. Extent of due process required

The extent of due process required depends on the severity of the action being taken. In a grade appeal, due process may be minimal; but for an academic dismissal on the basis of academic dishonesty, a greater amount of due process would be in order. Also, in instances where factors other than academic come into play, due process would be advised.

In Board of Curators of University of Missouri v. Horowitz, 46 L.W. 4179. United States Supreme Court, 1978, the concept of non-judicial interference in academic affairs was utilized to determine that due process requirements in academic matters need not be as stringent as those in disciplinary proceedings. Even though a lower court had concluded a hearing was necessary prior to dismissal, the Supreme Court, in this case, stated, "We decline to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship." However, in Greenhill v. Bailey, 519 F. 2d 5. United States Court of Appeals, Eighth Circuit, 1975, subjective statements as to the reasons for academic dismissal resulted in a decision to require some degree of due process. In that instance the court determined it would intervene when a state institution, "...acts to deprive an individual of a significant interest in either liberty or property."

3. Appearance of or actual arbitrary and capricious action

Where there is evidence of arbitrary and capricious action the courts will intervene. In Ochener v. Board of Trustees of Washington Community College District No. 17, 811 P.2d 985. Court of Appeals of Washington, 1991, the college cited precedence of non-interference in academic matters. The court, however, determined the need for judicial intervention when a grade is arrived at in an arbitrary and capricious manner.

D. Responsibilities of legal counsel and Student Affairs officer

Both the legal counsel and Student Affairs officer have an obligation to protect students rights and, at the same time, the institution. The roles these two individuals play in upholding that obligation may, however, be different.

1. Protection of students' rights

While the Student Affairs officer has a responsibility to protect the institution, s/he also has a responsibility to uphold students' rights. The development of adequate policies and procedures governing academic matters as well as ensuring that such policies and procedures are followed is a responsibility of the Student Affairs officer. There may be times that the Student Affairs officer is part of the process, but there still is an obligation to ensure fairness. While fulfilling this responsibility, the Student Affairs officer is also protecting the institution.

2. Protection of institution

Legal counsel for an institution will have a primary responsibility to protect the institution even though there is still an obligation to preserve students' rights. If an academic matter reaches the courts, legal counsel will clearly need to defend the institution. However, being sure that due process requirements are followed and satisfying one's self that institutional decisions were not arbitrary or capricious will be the best protection for the institution in the long run.

E. Need for policies and procedures

Clearly stated policies and procedures for handling academic dishonesty cases or grade appeals will ensure that the students' rights are protected as well as institutional integrity. A "blueprint" for action would, therefore, be readily available and avoids the development of ad hoc procedures to fill the need of the moment.

II. Academic Dishonesty

Academic dishonesty involves an act of utilizing someone else's work and representing it as one's own; having access to exam questions through improper or illegal means; or using notes or other aids when forbidden to do so while taking an exam.

A. Definition(s)

1. Cheating

   a. Copying from another exam paper either before or during an exam;

   b. Using notes or other methods of retrieval of information in instances where it has been declared improper;

   c. Having someone else take an exam or taking an exam for someone else;

   d. Using exam questions that have been improperly or illegally obtained; or

   e. Collaboration on take-home exams where it has been forbidden.

2. Plagiarism

   a. Buying or in any way using a term paper or other project that was not composed by the student turning it in;

   b. Direct copying of another term paper; or

   c. Failure to give proper credit to sources.

B. Policy statement

A policy statement for academic dishonesty matters should set forth a general philosophical premise, define academic dishonesty and set forth the due process mechanism for handling such violations.

1. Expectations of institution

The expectations of the institution should be made very clear for matters of academic dishonesty. Such expectations should be communicated through institutional publications and reinforced by faculty in the classroom setting.

2. Honor codes

Some institutions will have honor codes which a student signs or by accepting admission has implied consent. Where an honor code is part of the institutional expectation, the student becomes a partner in upholding the academic integrity of the institution.

C. Procedure

The procedure for handling academic dishonesty on the campus should be spelled out as clearly as possible. Different levels of offenses may require greater or lesser due process. However, regardless of the offense, some due process should be required in order to avoid arbitrary and capricious behavior.

1. Extent of due process

Procedural due process in disciplinary matters would usually require notice of the charges, a hearing, adequate prior notification of time, place, date of hearing and an opportunity for appeal. The severity of the possible consequences for engaging in an act of academic dishonesty would determine how formal or informal the process should be. For example, cheating on an exam with the possible consequence of failure for that exam could involve only the faculty member and the student involved. However, if the possible outcome could be suspension or expulsion from a program or the institution, then a more formal proceeding would be in order.

a. Notification

Notification of the charges should be in writing if the possible consequences might include probation, suspension or expulsion. If, however, the possible action taken would be less severe, verbal notification of the charges would be in order.

b. Hearing

If the possible outcome of academic dishonesty charges against a student could result in probation or dismissal, a formal hearing would be in order presided over by an individual or group other than the faculty member involved. For possible lesser outcomes; i.e., failure of an exam or course, the faculty member could serve as the adjudicating officer.

c. Appeal

In all instances of action taken as a result of academic dishonesty charges, the student should have a right of appeal.

2. Penalties or sanctions

Penalties or sanctions which would result from academic dishonesty violations could range from reprimand to dismissal. The severity of the potential action would determine the extent of due process required.

III. Grades and Grade Appeals

Occasionally, there may be situations in which a student disagrees with a professor's judgment regarding a grade or evaluation. Or, there may be a disagreement regarding the manner of arriving at a final grade or the process used to test knowledge gained. If such matters are taken to a court, the precedent of non-judicial interference in academic matters might be applied. (McIntosh v. Borough of Manhattan Community College, 449 N.Y.S.2d,26. Court of Appeals of New York, 1982.) However, the court could also require that the student exhaust all administrative remedies first. (Pfaff v. Columbia-Greene Community College, 472 N.Y.S.2d 480. Supreme Court Appellate Division, Third Department, 1984.) To ensure that administrative remedies were already in place, it would be advisable to have a grade appeal procedure.

A. Policy statement

A policy statement regarding grade appeals should be set forth. Such a statement would provide the rationale for allowing grade appeals in order to ensure that grading practices were based on sound academic procedure rather than arbitrary or capricious practices.

B. Procedure

The procedure for appealing a grade should be clearly enunciated. The route of appeal could be to an individual or group depending on the preference of the institution.

## Sample Policy

BOISE STATE UNIVERSITY

# ACADEMIC DISHONESTY

Cheating or plagiarism in any form is unacceptable. The University functions to promote the cognitive and psychosocial development of all students. Therefore, all work submitted by a student must represent his/her own ideas, concepts and current understanding. In an attempt to promote these ideals, dishonesty in the University can be defined generally as cheating or plagiarism in any form. The following are examples which can be used as a guide to the student in interpreting the above general definition, but is not meant to be an exhaustive list:

a. Buying or in any way using a term paper or other project that was not composed by the student turning it in;

b. Copying from another exam paper either before or during the exam;

c. Using crib notes or retrieval of information stored in a computer/calculator outside the exam room:

d. Having someone else take an exam or taking an exam for someone else;

e. Collaboration on take-home exams where it has been forbidden;

f. Direct copying of another term paper; or

g. Failure to give proper credit to sources.

The course instructor is responsible for handling each case of dishonesty in the classroom except where a major or repeated offense is involved. In a proven case of cheating, a student will be dismissed from the class and a failing grade issued. If the instructor and the department chair concur that a case ought to be referred for further University action (which could include suspension or expulsion from the University), the dean, or his/her designee, of the college in which the student is majoring will appoint a special hearing board consisting of three (3) faculty and three (3) students. The dean, or his/her designee, will preside over any hearing and will accord due process. The Academic Grievance and Academic Dishonesty Board would be the appropriate appeal body in such an instance. If a student feels he/she has been unjustly dismissed from class and given a failing grade, the Academic Grievance and Academic Dishonesty Board would be utilized as in any other case of an academic grievance.

## Sample Policy

BOISE STATE UNIVERSITY

# ACADEMIC GRIEVANCE AND ACADEMIC DISHONESTY BOARD

**Responsibility:** The Academic Grievance and Academic Dishonesty Board has the ultimate authority in academic matters. No further appellate provision will be available at Boise State University.

**Purpose:** To establish a procedure to maintain high academic standards and performance and to protect objectivity and fairness in assigning, administering, and evaluating student performance in all matters of grievance pertaining to academic conduct, instructional procedure, or testing.

### A. Procedure: Academic Grievances

In order to obtain a hearing by the Academic Grievance and Academic Dishonesty Board, the plaintiff should:

1. Present the grievance to the concerned faculty member first, then to the department head if no solution is reached, and finally to the dean or his/her designee of the college if the grievance is not resolved in steps 1 and 2.
2. If the problem is not resolved after contacting the faculty member, department head, dean or his/her designee of the college, then present the grievance to the ASBSU Vice-President.
3. Once the ASBSU Vice-President has accepted the complaint, the plaintiff is required to file a Grievance Complaint Form.
4. After the Grievance Complaint Form is returned, the ASBSU Vice-President notifies the defendant of the complaint and requests him/her to respond on the Academic Respondence Form.
5. When the form is completed and filed, the ASBSU Vice-President shall establish the time, place, and date of the hearing.
6. All academic grievances must be filed in the fall or spring semester immediately following the occurrence of the alleged grievance. (If the

course was taken in the spring semester, the student has until the end of the following fall semester to file the grievance.)

7. No grievance will be heard by the Academic Grievance Board during the last two weeks of the semester unless it concerns a course being taken that semester.

B. **Procedure: Academic Dishonesty**

1. If an instructor wishes to have a cheating or plagiarism offense referred for University action, he/she will confer with the department head.
2. If the department head concurs that the incident should be referred for additional action beyond failing the student in the course, the case will be referred to the dean or his/her designee of the college in which the student is majoring.
3. The dean or his/her designee of the college will appoint a special hearing board consisting of three faculty and three students with the dean or his/her designee as chair.
4. In such a hearing, University judicial procedures will be utilized as outlined in BSU Administrative Policy 4100-D and the Student Handbook.
5. The Academic Grievance and Academic Dishonesty Board will be the final hearing board in the event of an appeal.

C. The Board is empowered to mandate or recommend changes relating to student grades and behavior and to uphold or recommend sanctions relating to academic conduct, instructional procedure, and testing.

D. Mandates and recommendations regarding the student will be referred to the Vice-President for Student Affairs for implementation. Mandates and recommendations regarding faculty members will be referred to the Executive Vice-President for implementation.

Membership of the Academic Grievance and Academic Dishonesty Board consists of seven student senators, with an attempt being made to select one from each college or school of the University; seven faculty members appointed by the Chair of the Faculty Senate, one from each college or school; and one representative from the Division of Student Affairs appointed by the Vice-President for Student Affairs. The ASBSU Vice-President shall serve as Chair of the Board and shall vote only in the case of a tie. All other members have equal voting privileges.

# DISCIPLINING THE STUDENT

October 1-3, 1992
Elsa Kircher Cole
University of Michigan
Ann Arbor, Michigan

## I. Due Process in Student Conduct and Disciplinary Actions

### Public Institutions

An administrator at a public institution of higher education must generally meet the requirements of three areas of legal obligations in order to take disciplinary action against a student that will be legally defensible:

1. The U.S. Constitution, primarily regarding issues arising under the Fourteenth Amendment.

2. Federal and state laws.
   a. For example, the federal Higher Education Amendments of 1992 (commonly known as the "Reauthorization Act") requires that disciplinary actions for sexual assaults contain certain characteristics if the institution participates in any one of a large number of federal student aid programs.

   b. State administrative procedure acts or other laws may prescribe particular rules and procedures to be followed for suspension, expulsion or other actions against students while attending a state college or university.

3. The principles of contract law in the student/ institution relationship, that is, the following by the institution of its own rules and regulations regarding students. (Discussed below under Private Institutions section [B].)

A. Procedural due process requirements.

1. The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law." U.S. Constitution, Amendment XIV §1. A challenge to an institutional action against a student may allege the institution has violated due process guarantees by depriving the student of a liberty or property interest.

While the Supreme Court has not yet determined whether a property or liberty interest is at stake in the dismissal of a student from a public college or university, it assumed such existed in Board of Curators of the University of Missouri v Horowitz, 435 U.S. 78 (1978).

Other cases finding such interest in attending a college or continuing education are Picozzi v Sandalow, 623 F.Supp. 1571 (E.D. Mich. 1986); Jaksa v Regents of the University of Michigan, 597 F.Supp. 1245 (E.D. Mich. 1984); Hart v Ferris State College, 557 F.Supp. 1379 (W.D. Mich. 1983); Martin v Helstad, 578 F Supp. 1473 (W.D. Wis. 1983); University of Houston v Sabeti, 676 S.W.2d 685 (1984); Ross v Pennsylvania State University, 445 F.Supp. 147 (M.D. Penn. 1978).

Although it is clear that students probably have a property interest in continuing their education, students probably do not have a property interest in admission to college. Phelps v Washburn University of Topeka, 634 F.Supp. 556 (D.Kan. 1986) held that admission to a professional school is a privilege and not a constitutional or property right. See also Fleming v Adams, 377 F.2d 975 (lOth Cir.), cert. denied, 389 U.S. 898 (1967).

2. What due process is due?

An important due process case in public education is Goss v Lopez, 419 U.S. 565 (1975). In Goss the U.S. Supreme Court held that "at the very minimum . . . students facing suspension and consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing." In Goss the court recognized the timing of the notice and the nature of the hearing would depend upon appropriate accommodation of the interests involved. Goss required that the student be given oral or written notice of the charges against him and, if he denied them, an explanation of the evidence the authorities had and an opportunity to present his side of the story. All the other protections which would be available in a more formalized procedure in court were not required.

N.B.: Goss stops short of rigidly requiring a pre-suspension hearing in all cases. A student whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable. Goss at 582-83.

Accord, Picozzi, cited supra, at 1578. There a law school dean's action immediately suspending a student after a suspicious dorm fire without a hearing was upheld due to the dean's duty to protect the security of the law school community. The court also upheld the dean's action in refusing to write the student a letter of good standing to another school prior to a hearing, saying a dean must have the authority to take prompt and reasonable preliminary action that preserves a school's interest without finally and permanently depriving a student of his interest in continuing his education. Picozzi, at 1579.

A court in an earlier case, Dixon v Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961), listed the due process. requirements in that disciplinary action as follows:

> [1] The notice should contain a statement of the specific charges and the grounds which, if proven, would justify expulsion . . . [2] a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses is required. . . . In the instant case, [3] the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testified. [4] He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. [5] If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student's inspection. If these rudimentary elements of fair play are followed in the case of misconduct of this particular type, we feel the requirements of due process of law will have been fulfilled.

Dixon at 158-59.

3. Academic disciplinary actions require less due process protections than misconduct ones.

Since the U.S. Supreme Court decided Board of Curators of the University of Missouri v Horowitz, 435 U.S. 78 (1978) it appears that all that is now required in the context of discipline for poor academic performance is that a student be informed of the dissatisfaction with his performance in advance of the decision and the ultimate decision be careful and deliberate. Accord, Maurillo v University of Medicine and Dentistry of New Jersey, 781 F.2d 46 (3rd Cir. 1986); Schuler v University of Minnesota, 788 F.2d 510 (8th Cir. 1986). Further, members of a college's grade appeal committee are entitled to a presumption of honesty and integrity unless actual bias, such as personal animosity, illegal prejudice, or personal or financial stake in the outcome, can be proved by the student receiving the academic dismissal from the college. Ikneazu v University of Nebraska, 775 F.2d 250 (8th Cir. 1985).

The courts require less procedural safeguards for academic disciplinary actions because of the more subjective and evaluative nature of academic evaluations which require an expert evaluation of cumulative information and which are not readily adaptable to procedural tools of judicial or administrative decision making.

The notion that academic disciplinary actions require less due process than misconduct actions is supported by Ross v University of Minnesota, 439 N.W.2d 28 (Minn. App. 1989). In Ross, the plaintiff received a series of poor evaluations before he was dismissed. The court held that it would not interfere with the University's decision to dismiss the student. See also Clements v Nassau County, 835 F.2d 1000 (2nd Cir. 1987) (nursing student given three attempts to pass before dismissal was upheld). Doherty v Southern College of Optometry, 862 F.2d 570 (6th Cir. 1988), cert. denied, 110 S.Ct. 53 (1989) held that the court will interfere in this type of case only with the greatest reluctance.

N.B.: A more formal hearing with additional due process protection may be required even in an academic disciplinary action if a liberty interest is implicated, such as through the disclosure of the reasons for the action outside the school. The liberty interest is involved due to the potential damage to the student's reputation and his loss of ability to continue education in a particular field. See, for example, Greenhill v Bailey, 519 F.2d 5 (8th Cir. 1975), in which a court found the communication by a medical school to the Liaison Committee of the Association of American Medical Schools of a negative assessment of a student's intellectual ability imposed a stigma on him which deprived him of a liberty interest, as the association would allegedly release the assessment to medical schools across the country, so as to require a hearing with notice to the student of his deficiencies and an opportunity to be heard. Even in such cases, however, the full rudiments of due process are not required.

N.B.: Cases such as plagiarism and cheating may inextricably mix misconduct with academic matters. A safe practice, therefore, is to follow the due process procedures for misconduct dismissals in such actions because such proceedings against a student are more akin to cases involving the determination of factual matters as opposed to the academic subjective and evaluative judgments for which there is generally no hearing requirement. In addition, disciplinary actions for cheating are more stigmatizing and may have a greater impact on the student's future, therefore, calling for procedural protections. See, for example, Jaksa v Regents of the University of Michigan, cited above.

B. Elements of Fourteenth Amendment due process.

1. **Clear standards:** Proceedings must be based on standards of conduct which are expressed in clear and narrow terms so as not to be considered unconstitutionally vague

or over broad under the first amendment. Esteban v Central Missouri State College, 415 F.2d 1077 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970).

2. **Type of conduct regulated:** The standard of conduct which a college seeks to impose must be one relevant to lawful missions, process or function of the educational institution. Esteban v Central Missouri State College, cited above.

3. **Notice:** Notice may be oral or written in the case of a suspension of 10 days or less, Goss v Lopez, cited above. In other cases written notice may be required, see, e.g., Esteban v Central Missouri State College, cited above. The timing and content of the notice and nature of the hearing will depend on the appropriate accommodation of the competing student and institution interests involved. Goss v Lonez.

4. **Opportunity to be heard:** Normally this contemplates a hearing in person. Crook v Baker, 813 F.2d 88 (6th Cir. 1987). Note: there may be exceptions due to the plaintiff's location or incarceration. Martin v Helstad, cited above.

5. **Confrontation and cross-examination:** The U.S. Constitution does not require confrontation or cross-examination, Dixon v Alabama State Board of Education, cited above; however, decisions which have reached this conclusion are based on facts which indicate that some form of cross-examination was in fact afforded. Other courts have suggested where suspension or expulsion may result that the right to cross-examination is preferable. Esteban v Central Missouri State College, cited above.

6. **Legal representation:** Most courts have declined to grant students the right to counsel in disciplinary proceedings. Hall v Medical College of Ohio at Toledo, 742 F.2d 229 (6th Cir. 1984), cert. denied, 105 S.Ct. 796 (1985); Nash v Auburn University, 621 F.Supp. 948 (D.C. Ala. 1985). In certain cases, however, due process may require counsel be present to advise but not actually participate during the course of the hearing. See, e.g., Gabrilowitz v Newman, 582 F.2d 100 (1st Cir. 1978) in which counsel was allowed due to pending criminal charges.

Another exception to the rule occurs when the institution proceeds through counsel. French v Bashful, 303 F.Supp. 1333 (E.D. La. 1969), app. dismissed, 425 F.2d 182 (5th Cir.), cert denied, 400 U.S. 941 (1970), held that when the University uses counsel against a student, the student is entitled to counsel.

7. **Transcript:** It has generally been held the U.S. Constitution does not require a transcript or recording be made of the hearing. Jaksa v Regents of the University of Michigan, cited above. However, the first circuit court of appeals in Gorman, cited above,

stated that although the absence of a written transcript has not been a ground for reversing a disciplinary action, several courts have required some form of record. See also Esteban v Central Missouri State College, 415 F.2d 1077 (8th Cir. 1969), which stated that either party may record the proceedings.

8. **Open or closed hearings:** Allowing a student to choose the type of hearing has not yet been required by the courts as a matter of constitutional due process; a public hearing is therefore not required. Zanders v Louisiana State Board of Education, 281 F.Supp. 747 (W.D. La. 1968). State open meeting laws may affect this decision, however.

9. **Statement of reasons for the decision:** There is no requirement in law that suggests or demands the hearing board issue written findings of fact or conclusions of law similar to those required under the Federal Rules of Civil Procedure. Herman v University of South Carolina, 341 F.Supp. 226 (D.S.C. 1971), aff'd., 457 F.2d 902 (4th Cir. 1972). Note that state law may require such even though it is not constitutionally mandated or if a criminal action is involved.

C. Substantive due process requirements.

1. Although the majority of challenges to public institutions involve allegations of procedural due process violations, occasionally there are claims regarding substantive due process. The general rule has been that normally courts will not interfere with an institution's academic judgment unless it can be shown the decision was motivated by ill-will or bad faith unrelated to academic performance or that the decision was arbitrary and capricious. Hines v Rinker, 667 F.2d 699 (8th Cir. 1981); Stevens v Hunt, 646 F.2d 1168 (6th Cir. 1981); Wilkenfield v Powell, 577 F Supp. 579 (W.D. Texas 1983). The U.S. Supreme Court in Ewing v Board of Regents, 106 S.Ct. 507 (1985) has hopefully ended debate on that issue. The court there refused to review whether a medical school had misjudged Ewing's fitness to be a student saying:

> When judges are asked to review the substance of a genuinely academic decision . . . they should snow great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not exercise professional judgment.

Ewing at 513.

Accord, Susan "M" v New York Law School, 556 N.E. 1104 (N.Y. 1990). There a law student challenged her dismissal from law school for poor grades claiming the grade given for an exam was not a rational exercise of discretion by the professor. The trial court dismissed the claim but the appellate court reversed. However, the Court of Appeals reversed the appellate court saying,

> "As a general rule, judicial review of grading disputes would inappropriately involve the courts in the very core of academic and educational decision-making. Moreover, to so involve the courts in assessing the propriety of particular grades would promote litigation by countless unsuccessful students and thus undermine the credibility of the academic determinations of educational institutions. We conclude, therefore, that, in the absence of demonstrated bad faith, arbitrariness, capriciousness, irrationality or a constitutional or statutory violation, a student's challenge to a particular grade or other academic determination relating to a genuine substantive evaluation of the student's academic capabilities, is beyond the scope of judicial review."

2. An example of one of the few cases where a court questioned whether a university's academic evaluation was arbitrary and capricious is Shuffer v Board of Trustees of the California State University and Colleges, 67 Cal. App. 3d 208, 136 Ca. Rptr. 527 (1977). There, the college, for no discernible reason, required the student to participate in a course other than the one for which he had registered and gave him an incomplete because he did not attend that class but instead attended his original class. When the college refused to grant him a degree the student sued for a writ of mandate to compel the award of the degree. The appellate court reviewing the matter ordered trial on the issue as the college's action appeared arbitrary and capricious. Such a result can be avoided if the institution carefully considers the totality of a student's performance before deciding to dismiss for academic failure, gives notice to the student of academic deficiencies and an opportunity to be heard.

D. State administrative law requirements.

While federal constitutional due process may not require a hearing in a public college or university, a state administrative law may require one. See for example, Morrison v University of Oregon Health Sciences Center, 685 P.2d 439 (Or. App. 1984). Additional due process elements such as the right to counsel, and written findings of fact and conclusions of law by a board may also be required by state law. See, e.g., Kusnir v Leach, 439 A.2d 223 (Pa. 1982).

An example of one state which does not subject its universities to its administrative procedures act is Vermont. In Sprague v University of Vermont, 661 F.Supp. 799 (D.Vt. 1987), the court held that although the University is a state agency, the legislature did not intend its act to govern it.

E. The Higher Education Amendments of 1992 Requirements.

1. Section 486(c)(B)(iv) of the above act (a.k.a. the Reauthorization Act), Pub. L. 102-325, effective July 23 1992, requires institutions that participate in any one of a large number of federal student aid programs to have in their procedures for on campus disciplinary actions in cases of alleged sexual assault a "clear statement" that:

a. The accuser and the accused are entitled to the same opportunities to have others present during a campus disciplinary proceeding; and

b. Both the accuser and the accused shall be informed of the outcome of any campus disciplinary proceeding brought alleging a sexual assault.

F. Hate Speech Codes.

1. If a student conduct code disciplines students for "hate speech," the code must discipline students for all hate speech, not just hate speech containing a certain message (such as race, color, creed, religion or gender). R.A.V. v City of St. Paul, Minn., U.S. , 60 L.W. 4667 (June 22, 1992). To do otherwise is to regulate speech on the basis of its content, in violation of the First Amendment to the U.S. Constitution.

a. An example of a code that would withstand R.A.V. is the University of California's Student Conduct Harassment Policy. It makes a violation of the code:

> "The use of 'fighting words' by students to harass any person(s) on University property . . .
>
> "'Fighting words' are those personally abusive epithets which, when directly addressed to any ordinary person are, in the context used and as a matter of common knowledge, inherently likely to provoke a violent reaction whether or not they actually do so. Such words include, but are not limited to, those terms widely recognized to be derogatory references to race, ethnicity, religion, sex, sexual orientation, disability, and other personal characteristics. 'Fighting

> words' constitute 'harassment' when the circumstances of their utterance create a hostile and intimidating environment which the student uttering them should reasonably know will interfere with the victim's ability to pursue effectively his or her education or otherwise to participate fully in University programs and activities."

## Private Institutions

Administrators at private institutions have more latitude than do those at public institutions in promulgating disciplinary rules. Private institutions of higher education are generally not subject to the First or Fourteenth Amendment of the U.S. Constitution. However, administrators at private institutions must not operate in such a fashion so as to (1) be deemed arbitrary or capricious or (2) act out of conformance with their institution's published regulations which establish contractual rights for their students. In addition, the requirements of Section 486(c)(B)(iv) of the Higher Education Act Amendments of 1992, described above in section I(E), apply to private institutions that participate in any one of a large number of federal student aid programs.

### A. No due process right to a hearing.

1. Courts have long held there is no right of a student to a hearing at a private institution. See John B. Steffin University v Hunt, 102 So. 637 (Flat 1924); Dehaan v Brandeis University, 150 F.Supp. 626 (D.Ct. Mass. 1957): "While it may be better policy to hold a hearing whenever any disciplinary action is contemplated . . . I hold as a matter of law that the defendant is not required to do so."

2. Some courts find it difficult as a matter of contract law to grant an institution complete discretion to take action without any hearing. Those courts also tend, however, to find the standard of process applied in the situation to be adequate to avoid a conclusion of arbitrariness. For example: "A student should be given every fair opportunity of sharing his innocence" and the process should not be "so unreasonable and oppressive as to leave the conclusion of unfairness on the part of the teachers." Koblitz v Western Reserve University, 21 Ohio C.C. 144 (1901). The lack of a hearing or even an interview with the alleged perpetrator resulting in expulsion of a student was adequate as the student was given a right to present witnesses and offer his version at an appeal hearing, Mitchell Mitzel v Long Island University, 309 N.Y.S. 20 (Sup. Ct. 1970); "The standard of basic procedural fairness is to be used to measure the student disciplinary proceedings. The key to the standard is reasonableness." Swanson v Wesley College, 402 A.2d 401 (Del. SuP. Ct. 1979).

B. Need to follow published disciplinary procedures as matter of contract law.

1. Courts examine closely the institution's published procedures to be followed by private institutions in disciplinary actions and, if the institution varies materially from those procedures, e.g., no hearing held despite a University regulation providing one, the courts will intervene and overturn decisions. Tedeschi v Wagner College, N.Y.S.2d 760 (Ct. of Appeals 1980), reversing 417 N.Y.S.2d 521 which affirmed 402 N.Y.S.2d 967; Lightsey v King, 567 F.Supp. 645 (ED NY 1983); Morrison v University of Oregon Health Sciences, cited above. Corso v Creighton University, 731 F.2d 529 (1984) also follows the rule that the University's published procedures create a contract between the students and the university.

2. However, if failure to comply strictly with University established procedures for disciplinary proceedings does not amount to substantial and material violation of them, a court will uphold the validity of the proceedings. Clayton v Trustees of Princeton University, 608 F.Supp. 413 (N.C. N.J. 1985). Thus, no breach of contract will be found even if the private college's bulletin specifies "due process is followed in all disciplinary cases" as long as solid evidence supports the college's conclusions in a student disciplinary matter and absent any showing of harm resulting from the college's failure to allow the student's confrontation of witnesses. Life Chiropractic College, Inc. v Fuchs, 337 S.E.2d 45, 176 Ga. App. 606 (1985).

N.B.: Literal adherence to institutional rules may not be required when a dismissal rests upon experts' judgments as to academic or professional standards. See, Neal v Indiana University Board of Trustees, 435 N.E.2d 607 (Inc. App. 1982): "to countenance repeated irresponsible conduct and to place incompetent or irresponsible dentist in active practice" would ignore administrators' duty to the public, the court found substantial compliance with the disciplinary rules; Sofair v State University of New York, 388 N.Y.S. 453 (Sup. Ct., App. Div. 1976); Bonwitt v Albany Medical Center School of Nursing, 353 N.Y.S. 82 (Sup. Ct. 1973); no abuse of discretion, school followed normal procedures even if those were never precisely communicated. Balogun v Cornell University, 33 N.Y.S.2d 838 (Sup. Ct. 1971).

## II. Fraudulent Credentials in Admission of Students

A. Due process probably required prior to revocation of admission at public institution.

1. A student has a property interest in continuing education once a student has begun a course of study, however slight, and, therefore, there probably has to be some

due process accorded to that person before his admission can be rescinded by the school. See, Martin v Helstadt, cited above, which dealt with a student who was admitted to a public university's law school and who failed to disclose complete or accurate information concerning a previous crime and incarceration on his admission form. The court found that in that instance an opportunity to be heard in writing was sufficient to meet due process requirements. The court noted the school might be constitutionally required to provide a hearing at which an admittee could appear in person under different circumstances such as where he disputed the facts underlying the school's determination that the application was incomplete or untruthful.

2. If the student has commenced studies and is to be expelled for fraudulent application, he is entitled to a written notice of charges, sufficient opportunity to prepare to rebut charges, opportunity to have retained counsel at any hearings on charges, to confront accusers, to present evidence on his own behalf, an unbiased hearing tribunal and an adequate record of the proceedings. North v West Virginia Board of Regents, 332 S.E.2d 141 (W. Va. 1985). The court there found although the student had completed all requirements for his degree, since he had shown substantial capacity for fraud and deceit he could be expelled as "fraud is an all-pervading vice and whatever it touches it taints throughout, part cannot be bad and the rest good."

## III. Plagiarism in Thesis or Research Papers

### A. Public Institutions.

Public institutions vary as to whether plagiarism is treated as a disciplinary rather than an academic matter. If it is a disciplinary one, the attendant due process requirements in a public institution are necessary. But see, People v Board of Trustees of the University of Illinois, 134 N.E.2d 635 (1956) where the plaintiff attempted to turn in an examination paper which had been written by another student and was expelled and dismissed from the College of Medicine. The court found no formal hearing was necessary prior to this expulsion, that the student had no right to be confronted with accusing witnesses or given an opportunity to cross-examine them.

### B. Private Institutions.

In private institutions the special nature of the institution may allow for punishment of certain conduct which might go unpunished elsewhere or be dealt with less harshly.

For example, see Slaughter v Brigham Young University, 514 F.2d 622 (10th Cir.), cert denied, 423 U.S. 898 (1975). There the plaintiff, a Ph.D. candidate, used his advisor's name without his knowledge as his co-author of two articles submitted for publication to a technical journal to improve their chances for publication. The court upheld the school's dismissal of the graduate student for the act stating that such acts were "dishonest" in the context of a church school.

See also Napolitano v Trustees of Princeton University, 453 A.2d (NJ Super. AD 1982) where plaintiff was charged with plagiarism on a term paper in her final semester. She took sections from a particular book recommended by her professor verbatim without using quotations marks or footnotes. The book was the only work cited in the paper. The student's demand to be represented by counsel at a hearing of the University was rejected by the court, the student was found by the University to be guilty and her degree was withheld for one year. The trial judge, while personally believing the penalty to be too harsh, upheld the University's right to impose it as not unreasonable.

See also In Re Laberis, 443 N.E.2d 549 (S. Ct. Ill. 1982) where a student plagiarized two published works in writing a thesis which he submitted as satisfaction of a requirement for a master's degree in law. An attorney disciplinary proceeding found that he had knowingly plagiarized those works and that constituted dishonesty, fraud and deceit. The faculty of Northwestern University School of Law expelled him for plagiarism and complained to the attorney registration disciplinary committee. The court found that his plagiarism at the university warranted censure by the state bar.

See also Harris v Trustees of Columbia University. 470 N.Y.S.2d 368 (1983), rev'd, 474 F.2d 216 (1984), where a student was dismissed because prior to his re-enrollment as a student he had submitted a fraudulent letter attesting to his status as an employee of Columbia University in order to retain his university-owned apartment. The trial court held in favor of the student, but the Court of Appeals reversed finding that the student's character was a key element in the graduate program and, since there was no showing that the University failed to abide by its own rules and regulations in directing his expulsion, he had received fair treatment and due process in that he was apprised of the charge, accorded a hearing, albeit informal, and was apprised of his right to appeal. The fraudulent submission was determined to be of legitimate concern to the University in that it evinced a degree of dishonesty and lack of character, a matter of vital interest to an academic institution which may reasonably expect honesty and fairness by its students in dealing with the university.

C. Revocation of degrees.

1. If a student's plagiarism or fabrication of data is discovered after an academic degree is awarded, a public institution can revoke that degree but only after following appropriate due process procedures. Crook v Baker, cited above. Waliga v Board of Trustees of Kent State, 488 N.E.2d 850, 22 Ohio St.3d 55 (1986). The due process required is notice of the academic deficiencies and an opportunity to be heard. Cross examination of witnesses is not required. Note: The same principles apply to revocation of credits as do to revocation of degrees. Merrow v Goldberg, 672 F.Supp. 766 (D.Vt. 1987).

2. In a private university setting, a degree can be revoked for academic reasons if some minimal procedural protections exist to ensure at least fundamental fairness. Abalkhail v Claremont University Center, 2nd Civ. No. [illegible]3014012 (Cal. AD 1986), cert. denied, 107 S. Ct. 186 (1986). The courts will determine the sufficiency of the procedures based on the facts and circumstances of each case. In Abalkhail it was sufficient that the student received adequate notice of the charges against him, the possible consequences, and of the procedures to be used.

# ACADEMIC DISMISSALS OF STUDENTS IN PROFESSIONAL SCHOOLS

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I. Academic v. Disciplinary Dismissals

A. Courts have long recognized significant differences in the procedural requirements for dismissing students who violate student conduct codes versus dismissals for failure to meet academic standards.

1. Disciplinary Dismissals - These are usually based on determinations of fact not requiring any particular expertise; requires at a minimum notice and informal hearing.

a. "[A] charge of misconduct, as opposed to a failure to meet the scholastic standards of a college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses." Dixon v. Alabama State Bd. of Educ., 294 F.2d. 150, 158-59 (5th Cir.), cert. denied, 368 U.S. 930 (1961). The Dixon court held that due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct. Id. at 158. Notice should include a statement of the specific charges and grounds which, if proven, would justify expulsion. The nature of the hearing should vary depending upon the circumstances of each particular case. Although the Dixon court did not require a full adversarial hearing with the right to cross-examine witnesses, it required that a student be given the names of witnesses against him/her and an oral or written report of their testimony. A student should also be provided an opportunity to present a defense against the charges and witnesses' testimony on his/her behalf. The results and findings of the hearing should be presented to the student. Id. at 158-59.

b. In Goss v. Lopez, 419 U.S. 565, 581 (1975), the Supreme Court held that in the case of a suspension of a pupil from a public school for ten days or less, "the student must be given oral or written notice of the charges against him and if he denies them, anexplanation of the evidence the authorities have and an opportunity to present his side of the story." Goss requires that "students facing suspension and the consequent interference with a protected property interest" be given "some kind of notice and afforded some kind of hearing." Id. at 579 (original emphasis). The Court did not require that an institution afford the student a right to have counsel present, to cross-examine witnesses or to call his/her own witnesses, but required that there be at least an informal "give-andtake." Id. at 584.

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2. Academic Dismissals -- Such dismissals differ from disciplinary dismissals because the former are based on expert and subjective evaluations of academic performance and/or professional skill.

   a. In the landmark case of Board of Curators of the Univ. of Mo. v. Horowitz, 435 U. S . 78, 86 (1978), the Supreme Court found that "the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct . . . calls for far less stringent procedural requirements in the case of an academic dismissal." "[T] he determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision-making." Id. at 90. Therefore, the Court declined to require a hearing so as not to create an adversarial process and also to preserve the beneficial aspects of the student/teacher relationship. In his concurrence, Justice White suggested that in a case of academic expulsion, a student is at a minimum entitled to be informed of the reasons for dismissal and to an opportunity to personally state his/her side of the story. Id. at 96.

   b. In Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985), the Supreme Court reaffirmed its reluctance to review academic decisions and held that judges should "show great respect for the faculty's professional judgment" and "not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." In his concurrence, Justice Powell stated that "[j]udicial review of academic decisions, including those with respect to the admission or dismissal of students is rarely appropriate, particularly where orderly administrative procedures are followed." Id. at 230.

B. Distinctions between academic and disciplinary dismissals are sometimes blurred by the courts.

1. Courts generally consider academic dishonesty such as cheating or plagiarism to be student misconduct subject to a disciplinary dismissal. Under this view, students are entitled to the higher level of due process afforded in disciplinary proceedings. See Jaska v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1248-49 (E.D. Mich. 1984), aff'd per curiam, 787 F.2d 590 (6th Cir.— 1986) .

2. In Corso v. Creighton Univ., 731 F.2d 529, 532 (8th Cir. 1984), the court classified a student's cheating on an exam, then lying about it, as an academic offense rather than misconduct. However, because the student/ university relationship was contractual in nature and the student handbook which governed that relationship required a hearing in all cases involving "serious penalties," the court found that the university's contention that academic-related incidents did not require a hearing were unfounded. Id. at 531-33.

3. In Lightsey v. King, 568 F. Supp. 645 (E.D.N.Y. 1983), a Merchant Marine Academy student was accused of cheating on an examination. After being found not guilty by the school's honor board, Lightsey sought to have his exam grade reinstated. The professor refused and the school contended that the assignment of a zero grade was purely academic and thus within the purview of its faculty. The federal district court disagreed, holding that the reinstatement of the computed grade was "not an instance of discretionary grading" and that the matter was disciplinary, not academic, in nature. Id. at 648. The court took the unusual step of ordering the school to credit Lightsey with the computed exam grade.

C. Personal conduct as a component of academic evaluations.

1. Personal conduct can be considered a part of an academic evaluation. For example, conduct such as poor interpersonal skills probably can be considered part of an academic requirement in programs of study where such skills are important (e.g. medicine). Less clear is the extent to which conduct giving rise to discipline under a conduct code can be considered in academic determinations (e.g. compromising expected ethical standards of a program) without a hearing.

    a. In Brookins v. Bonnell, 362 F. Supp. 379 (E.D. Pa. 1973), a first year nursing student was summarily expelled from a state college after failing to submit a required physical exam report, failing to inform the college of her previous attendance at another nursing school, and failing to attend classes regularly. The student sued, alleging a violation of due process for not having been given a prior hearing. The court found that the facts did not fit neatly into either academic or disciplinary category, but that the reasons for dismissal were more nonconformance with school regulations than academic deficiencies. Scholastic standards were not involved in the court's view but, rather, disputed facts which adapted themselves readily to determination in a due process hearing.

b. Compare Horowitz where the U. S. Supreme Court found matters of interpersonal skills, attendance and personal hygiene relevant to academic evaluation. See also Depperman v. University of Kentucky, 371 F. Supp . 73 (E.D. Ky. 1974), where the court upheld a medical school's refusal to readmit a student who had resigned in lieu of termination for interpersonal deficiencies.

II. Due process protections are derived from two sources: the Fourteenth Amendment of the United States Constitution and general principles of contract law.

A. For public institutions, challenges to academic or disciplinary dismissals are generally based on allegations that an institution has deprived a student of a liberty or property interest in violation of the Fourteenth Amendment. See Horowitz, Goss, Ewing.

1. The following factors must be considered in identifying the specific dictates of due process. Mathews v . Eldridge, 424 U. S. 319, 335 (1976) .

a. the private interest that will be affected

b. the risk of an erroneous deprivation of such interest through the procedure used and the probable value of additional or substitute procedural safeguards

c. the government's interest, including the burden that additional procedural requirements would entail

2. In the case of an academic dismissal, deprivation of a liberty interest requires some publicizing of the reasons for the action which imposes a stigma or other disability that forecloses the freedom to take advantage of other opportunities. Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975) (citing Board of Regents v. Roth, 408 U. S. 564, 573 (1972)).

3. To establish a property interest in a benefit, a student must show more than an abstract need or desire for it. Rather, she must have a legitimate claim of entitlement to it. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
4. Examples of recognized liberty and property interests.

   a. In Greenhill, 519 F.2d at 8, the court found that a medical student was deprived of a significant liberty interest in future medical education when the school that dismissed him for academic reasons also notified the American Association of Medical Colleges that he lacked "intellectual ability."

   b. The Dixon court found that the "private" interest involved in the case was "the right to remain at a public institution of higher learning in which the plaintiffs were students in good standing." Dixon, 294 F.2d at 157.

   c. In Goss, the Court stated that "the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause." Goss, 419 U.S. at 574. The Court also found that charges of misconduct could seriously damage the students' reputations and interfere with later opportunities for higher education and employment, therefore infringing a liberty interest. Id. at 575-76.

5. However, the U.S. Supreme Court has not yet determined whether the dismissal of a student from a public college or university for academic reasons involves a property or liberty interest.

   a. Horowitz found it was not necessary to determine if the medical resident's academic dismissal deprived her of a liberty interest or a property interest (although no property interest was claimed) because it found that the resident was awarded at least as much procedural due process as is required by the Fourteenth Amendment when such deprivation takes place. Horowitz, 435 U.S. at 84-85. The Court assumed without deciding that it could rule on a substantive due process claim under an "arbitrary and capricious" standard, and found no evidence that such actions had taken place. Id. at 91-92.

   b. Ewing assumed the existence of a constitutionally-protected property right in the student's continued enrollment and held that even if the assumed property interest gave rise to a substantive right under the Due Process Clause to continued enrollment free from arbitrary state actions, there was no evidence of such action. Ewing, 474 U.S. at 223.

6. A number of lower courts have recognized a property interest in continued enrollment at a college or university. See, e.g., Gaspar v. Bruton, 513 F.2d 843, 850 (l0th Cir. 1975) (recognizing a property interest in a nursing student's continued enrollment in a state vocational school); Ross v. Pennsylvania State Univ., 445 F. Supp. 147, 152 (M.D. Pa. 1978) (recognizing that a graduate student has a property interest in the continuation of his studies); Stevens v. Hunt, 646 F.2d 1168, 1169 (6th Cir. 1981) (stating that a qualified property right in studying medicine has long been recognized in Tennessee); See also Schweitzer, 41 Am. U.L. Rev. 267, 274 n. 30, 314-16 (1992) .

7. Failure of an institution to comply with its own procedures does not in itself violate a constitutional right to due process if the process a student receives meets the minimum due process requirements of the constitution. Schular v. University of Minn., 788 F. 2d 510 (8th Cir. ), cert. denied, 479 U. S. 1056 (1987) .

B. Due process issues in private institutions arise in the context of allegations of breach of contract.

1. The relationship between a private university and a student is contractual in nature. In Corso v. Creighton Univ., 731 F.2d 529, 531 (8th Cir. 1984), a medical student expelled for cheating was required to prove that the university breached a contractual right in the procedures it used to expel him. The court required that the student be provided the procedural safeguard of a fair hearing and the right to appeal, pursuant to the university's handbook. Id. at 533.

2. The source of such contract rights are university catalogs, student handbooks, other published guidelines and oral representations by teachers and administrators. See Schweitzer (1992), p. 339.

3. Generally, courts hold that a private institution is bound by its own published guidelines or rules. See Tedeschi v. Wagner College, 404 N.E.2nd 1302 (N.Y. 1980). "[W]hen a university has adopted a rule or guideline establishing the procedure to be followed in relation to suspension or expulsion that procedure must be substantially observed." Id. at 1306.

4. In Napolitano v. Princeton Univ. Trustees, 453 A.2d 263, 272 (N.J. Super. Ct. App. Div. 1982), the court noted that the relationship between a private institution and its students cannot be described in purely contractual terms, but acknowledged the role that contract principles play. The court also found that the principles set forth in Horowitz accurately stated New Jersey's law in this arena. Id. at 275.

5. However, because the student-university relationship is unique, courts have cautioned against the rigid application of contract law to the relationship between student and university. Slaughter v. Brigham Young Univ., 514 F.2d 622, 626 (10th Cir. ), cert. denied, 423 U.S. 898 (1975).

6. Public institutions also recognize the existence of a contractual relationship between students and universities with the result that students may sue for breach of contract. See Ross, 445 F. Supp. at 152.

C. Educational institutions must also comply with requirements of state administrative or statutory law regarding due process. See, e.g., Morrison v. University of Or. Health Sciences Ctr., 685 P.2d 439 (Or. Ct. App. 1984).

III. Professional Students and Academic Dismissals

A. Medical Students

1. Horowitz, the seminal case which set forth the procedural due process requirements for a case of academic dismissal, involved a medical student who had received negative evaluations in her final year of study. Her negative evaluations were based on her poor performance in all clinical patient-oriented settings, her erratic attendance at clinical sessions, and her lack of concern for personal hygiene. After continued negative reports and several reviews, she was dismissed. She sued, claiming her right to procedural due process had been violated. Assuming a liberty and property interest, the U.S. Supreme Court held that because academic dismissals require expert evaluation and judgment, it would decline to enlarge the judicial presence in the academic community. It further held that no hearing is required in such cases. On the substantive due process claims, it held that assuming review of a decision under an "arbitrary and capricious" standard were appropriate, no showing of arbitrariness or capriciousness had been made.

2. In Stoller v. College of Medicine, 562 F. Supp . 403 (M. D. Pa. ), aff'd, 727 F.2d 1101 (3d Cir. 1984), a medical student was placed on academic probation for academic difficulties and an inappropriate attitude reflected in unprofessional exam responses. After he failed major clerkships and

received further negative evaluations the promotions committee voted to dismiss him. The student was afforded an opportunity to explain his poor performance before the committee and the dean, but the dismissal was upheld. Upon hearing the student's claim that his procedural and substantive due process rights had been violated, the court found that the student had received notice and an informal hearing at which he was given an opportunity to respond and after which he was informed of the outcome. This was held to be adequate due process. The court further found that because there was a rational factual basis in his receiving a failing grade and the faculty member was not motivated by bad faith or ill will, no finding of arbitrary or capricious action was warranted.

B. Nursing students

1. In Clements v. Nassau County, 835 F.2d 1000 (2d Cir. 1987), a nursing student alleged that faculty members' bad faith grading and evaluation of her clinical performance resulted in her inability to graduate. She had repeatedly demonstrated unsafe clinical behavior but was given several opportunities to improve her record. Although an academic committee recommended that she be allowed to take a final course for a third time in order to achieve a passing grade, a faculty member refused to change her prior failing grade. The court found that in cases involving academic dismissal, educational institutions have the right to receive summary judgment unless there is evidence that there was no rational basis for the decision or that it was motivated by bad faith or ill will unrelated to academic performance. Because there existed no such evidence and the college's four-step grievance procedure met the minimum standards of due process, the court affirmed the grant of summary judgment.

2. In Gaspar v. Bruton, 513 F. 2d 843 (10th Cir. 1975), the school's student manual provided that "the faculty reserves the right to dismiss at any time a student whose health, work or conduct demonstrates any lack of fitness to continue the program." After unsatisfactorily performing her clinical training program, the nursing student was placed on probation and later dismissed by the school board. She alleged a deprivation of her right to due process in that the dismissal was unreasonable, arbitrary and capricious, and a deprivation of a property right. The court recognized a property right had vested in the student, especially in light of the fact that she had paid a tuition fee. However, because all that is required by due process is that the student be made aware prior to termination of failure or impending failure, there was no due process violation in this case. Absent evidence of ill will, the court would not review her academic record.

C. Law Students

1. In Miller v. Hamline Univ. Sch. of Law, 601 F.2d 970 (8th Cir. 1979), a law student who was dismissed for deficient grades was denied readmission to the law school. The student brought suit, seeking readmission and claiming denial of due process because he was not allowed to appear before the admissions committee at a formal hearing. Because he was informed of his impending dismissal, was permitted to submit a written presentation to the admissions committee and was given the opportunity to privately contact the committee members, the court held that he was not denied due process.

2. In Anderson v. University of Wis., 665 F. Supp. 1372 (W.D. Wis. 1987), aff'd, 841 F.2d 737 (7th Cir. 1988), a law student who suffered from alcoholism and had previously withdrawn from school due to poor grades was informed that he could not return to school because of his academic deficiency. He petitioned the retentions committee for permission to continue his law studies several times, but was rejected because the committee concluded that he had not made sufficient progress toward overcoming his alcoholism to enable him to undertake the intensive work necessary to complete a legal education. Appeals to the school's higher authorities resulted in continued denial of readmission. The student brought a handicap discrimination claim against the school under § 504 of the Rehabilitation Act of 1973. Because he was unable to prove that he was excluded from the school solely by reason of his handicap, nor was he able to prove he was "otherwise qualified" to continue in school since he was unable to meet the required academic standards, this claim failed. He further alleged violations of substantive and procedural due process. The court concluded that he had submitted no evidence of a property right in being readmitted nor any evidence of arbitrariness or capriciousness in the school's decision. Furthermore, the court found that the procedure he was afforded exceeded those which were constitutionally required.

D. Dental Students

1. In Davis v. Mann, 882 F. 2d 967 (5th Cir. 1989), a dental student had received satisfactory evaluations in other areas of practice but was determined to be unsatisfactory in the family practice rotation. A faculty committee voted to dismiss him for academic reasons and afforded him an ad hoc hearing which he attended with counsel. After the hearing his dismissal was reaffirmed. The resident filed a procedural due process claim against the school's Board of Trustees and the dean. Without

deciding what type of interest the student had in continuing the program, the court held that he had received all the process he was entitled to under the Fourteenth Amendment.

E. Optometry Students

1. In Doherty v. Southern College of Optometry, 862 F.2d 570 (6th Cir.), cert. denied, 493 U.S. 810 (1989), an optometry student who suffered from retinitis pigmentosa and an associated neurological condition was unable to pass a newly implemented pathology clinic proficiency requirement because he could not perform certain instrumental techniques due to his physical affliction. The student appealed to the admissions committee requesting that the requirement be waived since it had not been in effect at the time of his admission. The committee and the Board of Trustees denied his appeal but granted him additional time to perfect the techniques, which he failed to do. When the school refused to grant him a degree, he filed suit, alleging a violation of § 504 of the Rehabilitation Act of 1973 and breach of contract. The court found that § 504 does not require a school to lower reasonably necessary standards to accommodate an individual whose handicap prevents him from meeting them. The court further held that implicit in the university's general "contract" with its students is a right to change its academic requirements if such changes are not arbitrary or capricious.

F. Graduate Students

1. In Kelleher v. Flawn, 761 F.2d 1079 (5th Cir. 1985), a graduate student in the last phase of a Ph.D. program held the position of assistant instructor ("AI" ) at the same university. After receiving complaints about the method and content of her teaching, the chair of the department met with the AI. The AI objected to a request that she use a Texas government text and to any review of her syllabus. Consequently, the chair reassigned her to an AI position without teaching responsibility. Although a grievance committee ruled that she was denied due process, the president rejected that finding. She filed suit, claiming that her reassignment to a non-teaching position without a prior hearing amounted to a violation of procedural due process. The court did not determine whether the AI had a property interest in her position because she remained an AI, albeit with different duties. The contract to teach that particular course had expired, and thus she had no property right in those duties. The reassignment did not constitute a constructive discharge. No liberty interest was infringed upon as no stigmatizing charges were made public.

IV. Medical Residents -- Employees or Students

A. Whether a resident physician is considered an employee or a student depends upon the context in which the question arises. Ross v. University of Minn., 439 N.W.2d 28, 32 (Minn. Ct. App. 1989).

1. For example, in collective bargaining cases, some jurisdictions have held that residents and other house staff are not employees, see Ross v. Univ. of Minn., 439 N.W.2d at 32, (citing Cedars-Sinai Medical Ctr., 223 N.L.R.B. 251 (1976) (holding that residents are not employees within the meaning of the National Labor Relations Act because they are primarily engaged in graduate educational training)), while others have held that residents are employees and are thus entitled to collective bargaining rights. See Regents of the Univ. of Cal. v. Public Employment Relations Bd., 715 P. 2d 590, 603 (Cal. 1986) (holding that "although housestaff obviously receive intensive professional training through their work, there is substantial evidence to support the [ Public Employment Relations] Board's finding that educational objectives are subordinate to the services they perform").

2. In taxation issues, courts have found that "residents are employees to the extent that their salaries/stipends are taxable income." Ross v. Univ. of Minn., 439 N . W . 2d at 32 (citing Hembree v. United States, 464 F.2d 1262, 1265 (4th Cir. 1972)).

3. In the academic field, courts have generally held that if a resident is dismissed for academic reasons, the relationship between the resident and the academic institution should be characterized as a student/teacher relationship rather than an employee / employer relationship.

a. In Dillingham v. University of Colo. Bd. of Regents, 790 P.2d 851 (solo. Ct. App. 1989), a medical resident was dismissed from the program after being placed on academic probation. Although the court found that the university had breached the "House Officer Training Agreement" by not giving the resident 30 days notice prior to termination of the contract and thus awarded him damages, it categorized the resident as a student when analyzing the propriety of the dismissal and required that the due process standard announced in Ewing be applied.

b. Ross v. Univ. of Minn. held that a resident is a student for the purpose of reviewing a decision to dismiss for academic reasons. The court found that "to hold otherwise would be to threaten the autonomy of academic institutions to determine standards for the passing and failing of students." Ross v. Univ. of Minn., 439 N.W. 2d at 33.

c. In Davis v. Mann, 882 F.2d 967, 974 (5th Cir. 1989), a resident argued that his dismissal from a residency program, which was by necessity also his dismissal from employment, should have included full procedural protections rather than the minimal protections required for an academic dismissal. The court found that "the primary purpose of a residency program is not employment or a stipend, but the academic training and the academic certification for successful completion of the program." Id. Thus, the court declined to apply the full procedural protections of the Fourteenth Amendment.

d. Vasquez v. Board of Regents, 548 So. 2d 251, 254 (Flat App. 2 Dist. 1989), held that the Board of Regents of the State of Florida did not employ residents in spite of the stipend they received, and that the relationship between the residents and the Board was wholly that of student/teacher rather than employee/employer.

e. Easaw v. St. Barnabus Hosp., 537 N.Y.S.2d 944, 950 (N.Y. App. Div. 1989), categorized a resident as a hybrid student doctor and hospital staff employee. Although the resident's medical competence was never questioned, he was charged with absenteeism which the court found was not directly consistent with academic criteria violations. Thus, the resident was entitled to the procedural due process provided for disciplinary matters by the hospital's manuals.

B. "Courts overwhelmingly agree that students, whether dismissed for academic or disciplinary reasons, are not entitled to as much procedural protection under the Fourteenth Amendment as employees who are terminated from their jobs." Davis, 882 F.2d at 973 (citing Horowitz and Goss). Generally, a contract of employment which contains no provisions regarding the duration or termination of employment is terminable at will. However, in cases where such provisions exist, the employer must adhere to the procedures provided in the contract. In cases where a property interest in continued public employment exists, Fourteenth Amendment protections apply.

V. Tandem Proceedings -- Consideration of Disciplinary Actions in Academic Dismissals.

A. Courts have consistently held that an institution may discipline students for off-campus misconduct. See, e.g., Krasnow v. Virginia Polytechnic Instit. & State Univ., 414 F. Supp. 55, 57 (W. D. Va. 1976), aff'd, 551 F.2d 591 (4th Cir. 1977) (holding that a university may discipline students for unlawful use or possession of drugs); Kusnir v. Leach, 439 A. 2d 223 (Pa. Commw. Ct. 1982) ("a college has a vital interest in the character of its students, and may regard off-campus behavior as a reflection of a student's character and his fitness to be a member of the student body").

B. Consideration of academic dishonesty or other forms of unethical student misconduct that result in disciplinary actions during academic dismissal proceedings is an issue yet to be fully addressed by the courts.

1. Gehring et al., National Association of Student Personnel Administrators, Inc. (1986), have discussed the issue of double jeopardy in cases of academic dishonesty/academic dismissals. They state that graduate and professional schools may argue that they have a higher standard of moral and ethical behavior. Thus, they may choose to initiate charges against a student for violating professional standards or ethics as a separate issue growing out of the same act of academic dishonesty. They further argue that double jeopardy would not be involved since the student is accountable to two separate jurisdictions -- institutional standards of academic dishonesty and the ethical standards of a particular profession. Gehring et al. (1986), p.16 -17.

2. Courts and institutions may consider unethical behavior or other inappropriate conduct while citing academic shortcomings as the primary reason for academic dismissals, thus avoiding the double jeopardy issue. Anderson (see III. C. above) involved a law student with poor grades and suffering from alcoholism who was dismissed from school. The school recognized that the alcoholism was a major cause of his academic difficulties, and further cited his conduct while enrolled in law school (harassment of his legal writing partner, the need to be escorted from a class he was attending while intoxicated and reports that other students felt threatened by his behavior, to the detriment of their own education) as reasons for believing that more than the beginning stages of rehabilitation were needed before he would be readmitted. Anderson, 665 F. Supp. at 1375, 1381. Although no disciplinary actions were taken in response to his behavior, the school in fact considered it apart from his academic underachievements. The court upheld his dismissal, finding no substantive or procedural due process violation.

VI. Avoidance of Academic Dismissal Challenges.

A. Milam and Marshall, 13 *J.C.U.L.* 335 (1987), suggested the following guidelines to reduce or eliminate prospective claims.

1. Identify academically inadequate students early.

    a. A substantial portion of academic dismissal cases in medicine and other graduate and professional programs are characterized by a history of "repeated shortcomings, academic deficiencies, and irregular progress." Milam and Marshall (1987), p. 346 (quoting Petition for Writ of Certiorari, *Ewing*).

    b. Students who have invested substantial time and money in graduate or professional programs are most likely to sue when they are dismissed because the universities have allowed them to continue their educations in the belief that they will receive a degree. *Id.*, p. 347.

    c. Consequently, an academically inadequate student who is dismissed early from a program does not have the same financial and personal investment; therefore, such a student may be less likely to initiate a lawsuit. *Id.*

    d. It appears that early dismissals do not result in additional legal risk to institutions. *Id.* *See* *Watson v. University of S. Ala. College of Medicine*, 463 F. Supp. 720 (S.D. Ala. 1979) (court upheld the academic dismissal of a first year medical student even though the evidence showed that students with similar records were given the opportunity to repeat their first year).

2. Notify the student of deficiencies in performance.

    a. Students who receive regular evaluations that are negative may be less surprised by an eventual dismissal and less likely to sue than students who receive no evaluations. Programs should consider providing students with individual evaluations from residents and faculty rather than condensing them into a single report. Milam and Marshall (1987), p. 348.

    b. Although faculty are required to evaluate behavior, personality and other personal characteristics of students in a clinical setting, there is little risk of liability for defamation if such evaluations are honest and made in a good faith exercise of professional judgment. *Id.*, p. 348 -50.

3. Establish criteria for minimum performance and enforce them consistently through a system of central control.

a. Problems arise when institutions fail to consistently enforce their criteria for minimum academic performance. Students who perceive that they are treated more harshly are more likely to seek legal redress. Id.

b. Professors should generally not alter or adjust these standards, but rather should leave appeals of grades or evaluations to the body established for that purpose. Id., p. 351.

c. An individual improvement plan can be developed to aid a student who has been identified as academically deficient. Such treatment is legal and beneficial to both the student and the institution. Id., p. 352.

B. Irby et. al., 8 *J.C.U.L.* 102, 111 (1981-82), recommend the following basic components for faculty review of academic proficiency.

1. Faculty assessment of student cognitive and noncognitive performance at the course level.

2. Review of student progress throughout medical school by a standing committee. The committee determines whether remedial work is needed or the student should be dismissed.

3. Student appeal of the committee's decision to the dean. Rules should stipulate that the dean's decision is final.

C. Schweitzer suggests basing the law of academic dismissals for both private and public institutions on contract principles. Schweitzer (1992), p. 361.

1. Advantages to this approach include the following. Id., p. 361 n.5.

a. Produces a uniform standard applicable to both public and private institutions.

b. Reduces doctrinal ambiguity.

c. Establishes the principal that all students in higher education have basic expectations and entitlements contingent on the successful completion of their studies.

2. Schweitzer believes that a modified "academic contract law" (as opposed to strict contract principles ) which safeguards institutions' ability to maintain academic standards is currently in the process of development. Id., p. 361.

3. The explicit and implicit rules and academic standards of the university comprise part of the "offer" which the student accepts and agrees to upon matriculation. Id., p. 362.

4. The principal of "substantial performance" should apply: minor divergences from established university rules should not confer a right of action nor constitute a violation of due process. Id.

5. Any university action deemed to be "arbitrary or capricious" would constitute breach of contract. Id.

6. The long-standing deference by courts to academic evaluations should generally remain. Id., p. 364-67.

    a. The most judicial deference is due in cases of determining the proper grade for a course.

    b. Slightly less deference is due in cases where academic impressions are used to determine whether students should be promoted or graduated.

    c. Less deference is due in decisions concerning academic and pedagogical policies of the university, such as what grade point average and number of credits are required for graduation, or whether credit should be denied for excessive absence from classes.

D. Additional recommendations

1. Schools should develop the best possible means to identify candidates during the admissions process who are most likely to succeed in the program of study.

2. Once admitted, students' academic deficiencies should be well documented. In addition, faculty should not provide contradictory evaluations (e.g., good letter of recommendation notwithstanding poor performance).

3. Students should not be given too many opportunities to improve performance. These can create heightened expectations by students and inconsistent application of standards.

4. Too many layers of review of academic performance may not provide significantly greater protection from allegations of due process violations. Instead, such reviews can create procedural errors, waste institutional resources, and may open the door for allegations of due process violations from the school attorney advising multiple review bodies (and may give rise to professional responsibility issues).

5. Educate faculty about the need to define and apply academic standards as consistently as possible, to identify problems early, to document poor performance, and to be honest in their evaluations.

VII. The Future of Due Process in Academic Dismissals

A. The above cases indicate that courts have continued to follow the due process requirements in cases of academic dismissals as outlined by the Supreme Court in Horowitz. Although the Supreme Court has not yet determined whether a property interest exists in these cases, some lower courts continue to recognize such rights. Others have continued to "assume" such rights because in most cases, more than the required due process has been provided the student. Recent cases indicate that the courts will continue to defer to the expert and professional subjective judgments of school officials in cases of academic dismissals.

B. Recent Cases

1. Ezekwo v. NYC Health and Hosp. Corp., 940 F.2d 775 (2d Cir.), cert. denied, 112 S. Ct. 657 (1991). A brochure given to prospective medical residents stated that each resident would serve as Chief Resident for four months during the third year. During her second year, a female resident wrote several memoranda complaining of shortcomings in the attending physicians' management and teaching skills. She soon received poor evaluations which she claimed were in retaliation for her opinions. Faculty members then decided to change from a rotational system to a merit system for selecting a Chief Resident and chose not to appoint the plaintiff Chief Resident. The resident brought suit alleging a property interest in the position of "Chief Resident" which she claimed she was denied without due

process. She further alleged that the hospital interfered with a protected liberty interest. The court held that the "policies and practices" of the institution were such that a property interest existed in the position of Chief Resident. Because the decision to pass over the resident resulted from the hospital's decision to adopt entirely new selection criteria and these criteria were not made known to residents in the program until after the decision to bypass had been made, the court found that insufficient due process had been provided. Damages were awarded in the amount of the pay difference that accompanied the designation of Chief Resident.

2. Doe v. Washington Univ., 780 F. Supp. 628 (E.D. Mo. 1991). A third year dental student at Washington University was disenrolled by a university committee due to his positive HIV status because of the risk of transmission of the disease to patients. The committee explored ways in which the student's career objectives might still be accommodated and even reviewed opportunities for admission to a dental school which operated a clinic solely for HIV-infected patients. When the student did not respond to an offer of an indefinite leave of absence, he was dismissed. He filed an action alleging discrimination in violation of § 504 of the Rehabilitation Act of 1973. The court found that the decision to disenroll the student was wholly academic, but held that he had not established that he was "otherwise qualified" for participation in the program due to the significant risk of communicating the disease that he posed. The court further found that the university had not acted arbitrarily in its dismissal of the student, thus not violating his substantive due process rights.

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# STUDENT DISCIPLINE: RIGHTS & RESPONSIBILITIES
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**"Turning to the nature of the governmental power to expel the plaintiffs, it must be conceded . . . that that power is not unlimited and cannot be arbitrarily expressed."**
*Dixon v. Alabama*, 294 F.2d 150 (5th Cir. 1961).

I. Is it Academic or Behavioral?: Distinguishing the Types of Sanctionable Conduct

A. Courts have long recognized that "there are distinct differences between decisions to suspend a student for disciplinary purposes and similar actions taken for academic reasons which may call for hearings in connection with the former but not the latter." *Board of Curators v. Horowitz*, 435 U.S. 78 (1978). "Misconduct is a very different matter from failure to attain a standard of excellence in studies. A determination as to the fact involves a investigation of a quite different kind. A public hearing may be helpful to the ascertainment of misconduct and useless or harmful in finding out the truth about scholarship." *Horowitz* citing *Barnard v. Inhabitants of Shelburne*, 102 N.E. 1095 (1913).

B. The courts recognize a college's inherent right to set standards for behavior. The power to punish by itself is not enough to justify sanctioning a student; the establishment of rules is fundamental. *Soglin v. Kauffman*, 418 F.2d 163 (7th Cir. 1969). The types of behavioral misconduct vary according to the individual student's own creativity and conscience.

C. Academic discipline covers a broad spectrum of issues, including a student's failure on an examination, the plagiarizing of a term paper, dismissal from a graduate program for failure to satisfactorily progress toward a degree, and the revocation of a former student's degree. Policies and procedures should vary according to the nature of the decision to be made. In particular, it should be noted that decisions concerning academic dishonesty and degree revocation at a public university must comply with procedural due process requirements not required in decisions which are "purely" academic in nature.

II. The Guiding Legal Principles: The Constitution and the Contract

A At public institutions of higher education, the law is well settled that prior to the imposition of sanctions, you must afford students notice and an opportunity to be heard. Dixon, *supra*. This principle is derived from the protections established by the due process clause of the US Constitution. Your proceedings may also be governed by procedures set forth in state administrative laws. *Morrison v. U. of Oregon Health Sciences Center*. 685 P.2d 439 (Or. App. 1984). And, except for those states where there is no abrogation of sovereign immunity, general principles of contract law will apply as well.

1. Constitutional Due Process - A Primer

    a. The source: Fourteenth Amendment to the Constitution of the United States:

        No state shall . . . deprive any person of life, liberty, or property, without due process of law .... Adopted July 28, 1868.

    b. Interest protected

        1. Life. Extremely high due process standards required in capital cases . *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

        2. Property. More than ownership of realty, chattels, or money. It also includes "entitlements," interests already acquired in specific benefits. But this requires more than an abstract need or desire for or unilateral expectation of the benefit; there must be a legitimate claim to the benefit under state or local law. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

        3. Examples of property interests

            a. Property interest in continued welfare benefits. *Goldburg v. Kelly*, 397 U.S. 254 (1970).

            b. Property interest in retention of a driver's license. *Bell v. Burson*, 402 U.S. 535 (1971).

            c. Property interest in continued utility service. *Memphis Light. Gas & Water Division v. Craft*, 436 U.S. 1 (1978).

            d. Property interest in public employment. *Arnett v. Kennedy*, 416 U.S. 134 (1974); cf, *Bishop v. Wood*, 426 U.S. 341 (1976).

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e. Property interest in degree, once earned. *Crook v. Baker*, 813 F.2d 88 (6th Cir. 1987).

f. Property interest in public education. *Goss v. Lopez*, 419 U.S. 565 (1975).

4. Liberty. Encompasses more than the right to be free from physical restraints imposed by government, whether criminal or noncriminal. Also includes the right to contract, to engage in gainful employment, to acquire knowledge, to marry, to establish a home, to have children, to worship, and "to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390 (1923).

5. Examples of liberty interests

   a. Liberty interest in engaging in constitutionally protected speech. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977).

   b. Liberty interest in retaining custody of children. *Santosky v. Kramer*, 455 U.S. 745 (1982).

   c. Liberty interest in retaining citizenship. *Vance v. Terrazas*, 444 U.S. 252 (1980).

   d. Liberty interest in reputation if that reputation would be damaged by the loss of employment; if the reasons for the loss are false; and if such loss is made public, foreclosing other employment opportunities. This is the so-called "stigma-plus" test. *Codd v. Velger*, 429 U.S. 624 (1977).

   e. Liberty interest in student's associational relationships with other students and future educational or employment opportunities which might be foreclosed by disciplinary action. *Goss, supra.*

B. Courts are more reluctant to interfere in the disciplinary proceedings of a private university. *Boehm v. U. of Pa. School of Vet. Med.* 573 A.2d 575 (Pa. Super. 1990). Most courts agree that the relationship between a private college and its students is contractual in nature.

1. Courts generally agree that the student-university relationship is unique and should not be subjected to the rigid application of commercial contract doctrine. *Slaughter v. Brigham Young University*, 514 F.2d 622 (10th Cir. 1975).

2. The student-university contract merely requires that you afford an accused student those procedural safeguards which the institution has in place, so long as those safeguards conform to commonly accepted standards of fundamental fairness. Substantial compliance with internal procedures is required. *Corso v. Creighton University*, 731 F.2d 529 (8th Cir. 1984).

III. What Process Is Due?: The Necessary Procedural Requirements

A. The following sets forth the necessary elements of a fair and impartial hearing. For an excellent example of a model code of conduct read, E. Stoner & K. Cerminara, *Harnessing the "Spirit of Insubordination": A Model Student Disciplinary Code*, 17 J. Coll. & Univ. Law 89 (1990).

1. Notice of the charges (*Goss supra)*.

2. Opportunity to be heard (Goss, *supra)*.

3. Confrontation and cross-examination of witnesses is not mandatory (*Dixon, supra)*, but most courts suggest that some form of questioning should be allowed (*Esteban v, Central Missouri State College*, 277 F.Supp. 649 (W.D. Mo. 1967). Courts generally agree that allowing only the hearing panel to cross examine witnesses is sufficient. *Nash v. Auburn Univ.*, 812 F.2d 655 (11th Cir. 1987).

4. Legal counsel for student not required (*University of Houston v. Sabeti*, 676 S.W.2d 685 (Text App. - Houston [1st Dist.] 1984), but courts suggest that if the institution proceeds through counsel, the student must be allowed legal counsel (*Gabrilowitz v. Newman*, 582 F.2d 100 (1st Cir. 1978), *Wasson v. Trowbridge*, 382 F. Supp. 912 (2d Cir. 1967). If a criminal case is proceeding simultaneously, it is in your best interest to allow the student to be advised by counsel. Courts do not require that counsel be allowed to participate in the hearing. *Gabrilowitz, supra*.

5. In the event that criminal charges are also pending, the accused student can invoke the 5th Amendment right against self incrimination prior to the resolution of the criminal case. *Picozzi v. Sandalow*, 623 F.Supp. 1571 (E.D. Mich.) *aff'd*, 827 F.2d 770 (6th Cir. 1987). This does not mean you cannot resolve your disciplinary charges in advance of the resolution of the criminal

case, however, the student's silence may not be used against him. A violation of the student code of conduct may be found based upon the other evidence presented at the hearing.

6. The rules of evidence, federal or state, do not apply to disciplinary hearings. *Nash, supra.*

7. The standard for proving that a violation occurred should be by a preponderance of the evidence or the "more likely than not" test. The criminal standard of "beyond a reasonable doubt" is too rigorous for a disciplinary proceeding, and while some colleges use the middle tier standard of "clear and convincing," this too is unnecessarily rigorous.

8. Verbatim transcript is not mandatory (*Jaska v. Regents of University of Michigan*. 597 F. Supp. 1245 (E.D. Mich. 1984), but a good idea especially if the ultimate decision is to be made by someone not present at the hearing. *Esteban, supra.*

9. Public hearing is not required and should not be required due to privacy rights of students pursuant to FERPA (20 USC 1232g) unless the student requests an open hearing in writing.

10. Statement of reasons for decision is not required by all courts, but should be provided if for nothing more than to document your own actions.

11. Courts do not require an appeals mechanism. However, a higher administrative review of the decision provides balance and can insure fairness.

12. Courts will permit deviations from written policies without finding a due process violation provided that the deviation is not material. *Jaska. supra.*

B. Interim suspension pending a hearing is allowed if the student presents a danger to herself or the college or university community. *Goss, supra.*

IV. Degree Revocation

A. Can an institution revoke a degree?

1. If by statute you are accorded the right to confer degrees, then you can revoke them as well. *Waliga v. Board of Trustees of Kent State University*, 488 N.E.2d 850 (Ohio 1986). Most commentators agree that the right to revoke a degree is inherent.

2. For what reasons can you revoke a degree? Fraud or deceit in the attainment of the degree are the most commonly cited reasons for revocation.

B. How do you revoke a degree?

1. A policy which addresses this matter is essential and must afford the student all of the elements of procedural due process. See section III above. It may be appropriate to add additional protections, including an investigatory period, extensive exchange of documentary evidence, expert witnesses, stenographic recording of the hearing, and an appeal to the president, chancellor, or board of regents.

2. If the power to confer degrees is exclusively vested in your regents, it may be argued that only the regents may revoke the degree; in other words, the power to revoke a degree may not be delegable. *Hand v. Matchett*, 957 F.2d 791 (10th Cir. 1992). If this is the case in your state, insure that your process provides for final action at the regents level.

3. The leading case in this area is *Crook v. Baker*, 813 F.2d 88 (6th Cir. 1987). In Crook, the court upheld the institution's right to revoke a degree fraudulently obtained and discussed the process required. This opinion pointedly concludes with the statement that this situation may never have arisen if the faculty had more closely supervised its students. Indeed, the revocation of a degree is an extremely serious matter, the mere suggestion of which places the student's entire career and reputation at stake. Many degree revocations will give rise to litigation; the student will contend denial of due process no matter how well you "process" them and, in addition, should be expected to allege defamation of character and liberty interest violations as well.

V. Fraudulent Admissions

A. There is no constitutional right to admission to an institution of higher education. *Brookins v. Bonnell*, 362 F.Supp. 379 (E.D. Pa. 1973).

1. As long as admission standards remain within constitutionally permissible parameters, it is exclusively within the province of higher education officials to establish the criteria for admissions. *Martin v. Helstad*, 578 F. Supp. 1473 (W.D. Wisconsin 1983). As long as the conduct of the admissions officials is not high-handed, arbitrary, or capricious, those officials should be left alone to do their job without inference from the judiciary. *North v. West Virginia Board of Regents*, 332 S.E.2d 141 (W.Va. 1985).

2. You must follow the criteria set forth in your admission policies. The failure to follow the stated admissions guidelines may give rise to a cause of action for breach of contract. *Steinberg v. Chicago Medical School*, 371 N.E.2d 634 (1977).

3. If there is no property right in admission, then is there also no right to due process for cancellation of admission? The court in *Martin* found that a letter of admission which was accepted by the student created a mutually explicit understanding. To then cancel the admission before school began necessitated some minimal due process.

B. Are fraudulent statements on admissions documents sufficient grounds to dismiss a student or deny his application?

1. You may deny admission or dismiss a student for fraud committed in the application process. *Martin. supra.* See also, *Woodward v. Marsh*, 658 F. Supp. 989 (5th Cir. 1981).

2. Your student disciplinary code, catalog, and application forms should clearly state that falsification of university documents may result in dismissal and/or denial or cancellation of acceptance.

C. Once admitted and enrolled, the student probably has a property right in continued enrollment. *Goss, supra.* If you discover the fraud at this point, you must provide all the elements of due process. *North, supra.* Keep in mind that fraud is not an academic issue but rather, a disciplinary matter.

VI. Academic Decision-making—Is it truly free from judicial interference?

A. Courts have resisted applying strict procedural due process guidelines in cases involving the discipline or dismissal of students for purely academic reasons. Courts are somewhat less reluctant to review an academic decision when substantive due process violations are raised.

1. In the leading case, *Board of Curators v. Horowitz*, 435 U.S. 78 (1978), the Supreme Court distinguished the dismissal of a student for misconduct from the suspension of an academically inadequate student. Horowitz, a medical student, was dismissed from the program without being afforded the full panoply of pre-termination due process safeguards. In upholding the dismissal, the court stated, "Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact-finding proceedings to which we have traditionally attached a full hearing requirement. The decision to dismiss respondent, by comparison, rested on the academic judgment of school officials ...."

2. While courts rarely review the substance of an academic evaluation, they will wade in upon a showing of arbitrary or capricious factors not reasonably related to academic criteria, (*Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), or stigma to the student's reputation as a result of the decision. *Greenhill v. Bailey*, 519 F.2d 5 (8th Cir. 1975). In *Ewing*, the court stated that no substantive due process violation occurs when there is no "substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment."

B. Even though courts have not found that students have a property interest in continued enrollment for academic decisions, they frequently assume the interest *arguendo*. For that reason, it is appropriate to put in place an academic grievance process which provides post-termination due process, particularly when the student's interest in enrollment is heightened, for instance, in medical and other professional schools, graduate programs, etc.

C. Title IX and Section 504 regulations require "grievance procedures providing for prompt and equitable resolution of student and employee complaints" that any academic action is taken on account of sex or handicap discrimination. (34 C.F.R. §106.8(b); id. §106.31; *accord*, 34 C.F.R. §104.7 on handicap.)

D. Thoughts on evaluating significant academic decisions:

1. Review the student's **complete** academic file;

2. Question those involved very carefully about the factors contributing to the dismissal or discipline;

3. Assure yourself that the student has not suffered from retaliation or discrimination in the evaluation process;

4. Review all written communications prior to distribution.

# Students in Professional Schools

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## I. INTRODUCTION

An increasing number of medical schools are facing legal challenges concerning the evaluation and dismissal of students, despite the time-honored tradition that places that right and responsibility in a medical school's faculty. The medical school faculty is charged with formulating policies on issues of admissions criteria, curriculum and format, standards for student performance and conduct, special requirements for students with academic problems and graduation requirements has been accepted as part of academic freedom.

Faculty are sometimes reluctant to evaluate students candidly given the enormous amount of time and expense students are devoting to their education and because of the threat of litigation over evaluations that a student feels is unfair. The Buckley Amendment has given students greater access to their educational records. With impending health care reform restrictions on the availability of residencies in specialty areas, students are even more acutely aware that the level of competition for residency training positions will increase accordingly. Negative evaluations could jeopardize a chance at a match with a desired residency program. As a result, students are more carefully examining grades and comments as entered in their records.

Growth in the volume of litigation also correlates with the increase in tuition, growing reliance on student loans and indebtedness of medical school graduates. As tuition has increased sharply, funding sources available have changed so that loans provide a growing proportion of the necessary funds. The growing average debt load incurred by the majority of medical students in 1981 was $19,697, by 1989, it was an average debt of $42,374.

In exercising professional judgment in academic matters, faculty members must exercise their best professional judgment and document both positive and negative observations of student performance. If, in their opinion, a student does not have the necessary clinical and personal abilities to perform adequately as a doctor and does not make adequate progress toward that goal, the faculty must take the necessary remedial actions to correct these deficiencies. If these actions fail, the student should be dismissed.

As suggested by a judge in one case upholding the dismissal of a medical student after five years of attempting to complete medical school, the real tragedy and perhaps unfairness to the student was the school's failure to dismiss the student earlier when there was ample evidence of his inability to meet scholastic standards. Prolonging this process is unfair to the student and to the school.

## II. ADMISSIONS

***Case Example: "Student N" was admitted to medical school but prior to enrollment, information was received from undergraduate institution that Student N had falsified information on AMCAS application two years previously, resulting in the withdrawal of his admission offer from a different medical school. Inconsistencies in his current AMCAS application are not serious enough, in and of themselves, to warrant withdrawal of his offer of admission. Student N did not offer information pertaining to his prior problems to the subsequent admitting school. May the current offer of admission be withdrawn ?***

The attainment of a diverse student body is a constitutionally permissible goal for an institution of higher education.

a) Academic freedom includes the selection of an institution's students. The right of a school to make its own selection process of those students who will contribute the most to the "robust exchange of ideas" is guaranteed by the First Amendment.

b) There is no constitutional or statutory "right" to attend college or graduate school. A postsecondary institute may establish standards and procedures for the admission and retention of students.

    1) *Examples:* It is legal for an admissions committee to reject an applicant whose GPA is below the prescribed cut-off. *Lesser v. Board of Education of New York, 18* A.D. 2d 388, 239 NYS 2d 776 (1963), who does not possess a certain academic degree required of all applicants *(Pappanastos v. Board of Trustees,* 615 F.2d 219 (5th Cir. 1980) or whose work is not deemed to be of sufficiently high quality *(Arizona Board of Regents v. Wilson),* 24 Ariz. App. 469, 539 P.2d 943 (1975).

Medical school faculty members, acting on behalf of the University, have the right to determine who shall be admitted to study. Because medical school faculty possess the unique professional judgment necessary to make admission decisions and are employed to do so, they must exercise this responsibility.

The courts have traditionally deferred to the expertise of medical faculty, according them broad discretion to formulating admission standards. However, three general considerations constrain admissions committees in formulating admission policies:

1) the selection process must not be arbitrary or capricious;

2) under contract theory the institution must adhere to its published admission standards and honor its admissions decisions; and

3) the institution may not unjustifiably discriminate on the basis of race, sex, handicap or age.

In *North v. West Virginia Board of Regents, 332 SE 2d* 141 (W.VA. 1985), a medical student challenged his expulsion for alleged falsification of information on his application for admission. The case was originally remanded for proper University-based proceedings, which ultimately recommended that North be expelled. North obtained a preliminary injunction ordering that he be permitted to continue his medical training. Thus, North completed all of the requirements for a medical degree, while the case worked its way through the judicial system. Despite the awarding of his degree, the West Virginia Supreme Court of Appeals upheld the lower court and the University's decision to expel. North's degree was rescinded.

Key in the decision was the Court's ruling that although North was not yet a student, disciplinary rules applied to the conduct of the individual in making application. North attempted to argue that the student handbook, which contained a specific article that any student violating any university regulation or rule is subject to disciplinary action including expulsion and an additional paragraph which states "Falsification of records in any detail (academic records, health records, change slips, etc.) ... is prohibited." North argued that the second rule by being specifically applicable to a student cannot be deemed to bear on his conduct before he became a student at the University.

The Court responded by finding the argument:

> "... ultimately unpersuasive; it employs legal reasoning akin to circus contortionism and ignores what is fundamental knowledge among all students of higher education, namely, that a person who cheats to get into school and gets caught will be expelled. In addition, a compelling argument can be made

> for the proposition that no rule or formalized written regulation is required to expel a student who gains admission to a college or university by lies and deceit. His admission was assured only because he gave information that cast him in a more favorable light than the true facts would allow. From the date of his admission, North enjoyed the fruits of his deliberate misrepresentations."

North also argued that the University sat on the information and that therefore the University was estopped from pursuing disciplinary measures. The court found no factual basis for this assertion, as the record demonstrated that authorities at the University acted expeditiously to bring the petitioner to a hearing. The Court also noted its unwillingness to acquiesce in his contention: "... in West Virginia, and particularly in our schools of law and medicine, we assume honesty and integrity on the part of those with whom we deal. There is no duty on the part of any officer at our colleges and universities to presume or even to suspect fraud."

Finally, North argued that his expulsion was an excessive sanction for the transgression he committed. The Court rejected his argument, stating:

> "... the courts of this state have traditionally given substantial deference to the discretion of officials of colleges and universities with respect to academic dismissal and such decisions .. "are not ordinarily reviewable by the courts." Indeed, there is substantial justification for giving such discretion to school officials. Those officials are in the best position to understand and appreciate the implications of various disciplinary actions. The [faculty and administrators] have the best perspective to make disciplinary decisions based upon their impact on general admissions practices, the prospect of displacement of other students, the value of exemplary discipline and the need to assure a high level of personal character in the graduates of professional schools.
>
> The initial responsibility for determining the competence and suitability of persons to engage in professional careers lies with the professional schools themselves. As long as the conduct of educators is not high-handed, arbitrary or capricious, educators should be left alone to do their job without interference from those of us in the judiciary who have neither the expertise nor the insight to evaluate their decisions."

North argued he had shown himself to be a competent student and a person who will be a competent practitioner of medicine. But the Court felt he had also shown substantial capacity for fraud and deceit by a carefully contrived plan to cheat his way into medical school in the first instance.

"The practice of medicine is not a simple matter of routine application of scientific principles .... Physicians must not only be technically competent but they must also possess a surpassing degree of ethical commitment and sense of human decency. On the record, any reasonable person would be justified in having reservations about whether North possesses sufficient character to allow him to practice medicine without subjecting the public to potential unethical conduct.

"In 1887, Judge Johnson, speaking for our Court in Landemann observed that "..fraud is an all-pervading vice and whatever it touches it taints throughout. Part cannot be bad and the rest good. It is all bad." That observation is as true today as it was nearly one hundred years ago. Any action short of expulsion would necessarily have constituted some degree of reward for fraudulent misconduct on the part of petitioner. It is, therefore, our conclusion, that not only was the action complained of justified, it may well have been the only appropriate response available to the University."

A) Institution's duty to educate - how is it defined ? How is it defended?

1) In General: In *Regents of the University of California v. Bakke,* 438 US 265 (1978), the Court outlined the four essential freedoms that constitute academic freedom:

> "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university -- to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught and who may be admitted to study."

2) Duty to Educate: The basic legal relationship between a student and a university or college is contractual in nature. An institution's catalogues, bulletins, circulars and regulations become a part of the contract. It can also be reflected in institutional custom or practice, through oral representations or derived from some other source.

a) However, all aspects of the university student relationship are not subject to remedy through a contract action.

1) In general, a plaintiff's claim for breach of contract must do more than simply allege that the education was not

good enough. Instead, the student must point to an identifiable contractual promise that the defendant failed to honor.

b) When decisions are premised on academic or pedagogical considerations, courts are usually reluctant to substitute their judgments for those of trained academics.

   1) See: *Regents of the University of Michigan v. Ewing, 474 US 214 (1985),* where the Court held: "When judges are asked to review the substance of a genuinely academic decision, ... they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgement."

   2) See: *Bleicher v. University of Cincinnati College of Medicine*, 604 NE 2d 783 (1992): student who was dismissed from medical school for poor scholarship brought breach of contract action against school. The Court held that school abided by its own educational guidelines and thus did not breach its contract with student.

      "It is axiomatic that when a student enrolls in a college or university, pays his or her tuition and fees and attends such school, the resulting relationship may reasonably be construed as being contractual in nature. In addressing the issue of whether such contract has been breached, the trier of fact appropriately looks to the terms of the contract as found in the college guidelines supplied to students. However, where the contract permits, the parties may alter its terms by mutual agreement, and any additional terms will supersede the original terms to the extent the two are contradictory."

      The higher court affirmed that the trial court was required to defer to academic decisions of the college unless it perceived such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

## III. DISMISSAL OF STUDENTS

Dismissal are generally either academic or disciplinary in nature. Academic dismissals rely on professional evaluation of a student's academic and/or clinical performance, while disciplinary dismissals involve fact-finding regarding violations of institutional rules. Each receive significantly different treatment by the courts. Great deference is generally given to an institution's professional judgment in academic decisions, while greater attention is paid to due process requirements in disciplinary cases.

1) See: *Ewing* in which the Supreme Court stated that:

> "When judges are asked to review the substance of a genuinely academic decision ... they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."

### A) DUE PROCESS REQUIREMENTS

In general, the courts want only to see that minimal procedural protections have been respected in reaching such decisions, which include keeping the student appraised of inadequacies in performance and the consequences if those inadequacies are not corrected.

Students at public universities have challenged their dismissal from medical school on the ground that their right to due process of law under the 14th Amendment has been violated. Students in private schools have made similar challenges based on contract theory.

The courts have developed different standards of due process based upon whether the dismissal is for academic or disciplinary reasons. Academic dismissals results from a failure to attain a proper level of scholarship while disciplinary dismissal arises from violations of institutional codes of conduct.

A review procedure should include three basic parts:

1) Faculty assessment at the course level, with appropriate grading, evaluations and feedback to the student;

2) A formal committee charged with reviewing student progress throughout enrollment, with the power to require remedial work, special requirements or student dismissal and established standards for conveying those decisions to a student and giving the student the opportunity to be heard.

3) A process for appealing those decisions.

   a) See: *Gaspar v. Bruton*, 513 F.2d 843 (1975), one of the first cases to consider the extent of procedural due process rights for a student, the court held:

      > "School authorities, in order to satisfy Due Process prior to termination or suspension of a student for deficiencies in meeting minimum academic performance, need only advise that student with respect to such deficiencies in any form. All that is required is that the student be made aware prior to termination of his failure or impending failure to meet those standards.

   b) See: *Greenhill v. Bailey*, 519 F.2d 5 (1975) where a medical school informed the student and the Liaison Committee of the Association of American Medical Colleges that the student was dismissed for "lack of intellectual ability or insufficient preparation." It was not the dismissal but the notification to the AAMC that prompted the court to rule that the action deprived him of a significant liberty interest. Due process required that:

      > "[A]t the very least, Greenhill should have been notified in writing of the alleged deficiency in his intellectual ability, since this reason for his dismissal would potentially stigmatize his future as a medical student elsewhere and should have been accorded an opportunity to appear personally to contest such allegation. "... an informal "give-and-take" between the student and the administrative body dismissing him -- and foreclosing his opportunity to gain admission at comparable institutions -- would not unduly burden the educational process and would, at least, give the student "the opportunity to characterize his conduct and put it into what he deems proper context." The Court ruled the school had to give the student a hearing but did not have to readmit him.

c) See: *Board of Curators of University of Missouri v. Horowitz, 435 US* 78 (1978), which sharply limited the expansion of procedural due process in academic disputes. The university dismissed a student, who had received excellent grades on written exams, for deficiencies in clinical performance, peer and patient relations, and personal hygiene. As a result of faculty dissatisfaction with the student's clinical performance, the school's Council on Evaluation recommended that her graduation be delayed and that she be dropped from the program if major improvement did not occur. Special oral and practical exams were arranged, administered by non-faculty practicing physicians, to prevent any bias. The student performed poorly. At the end of the year, after further critical clinical reports, and following proper University Procedure. the student was dismissed.

On the issue of due process, the Supreme Court found:

"Respondent has been awarded at least as much due process as the Fourteenth Amendment requires. The school fully informed respondent of the faculty's dissatisfaction with her clinical progress and the danger this posed to timely graduation and continued enrollment. The ultimate decision to dismiss respondent was careful and deliberate. These procedures were sufficient under the Due Process Clause of the Fourteenth Amendment. ... the school went beyond [constitutionally required] procedural due process by affording [respondent] the opportunity to be examined by seven independent physicians in order to be absolutely certain that their grading of the [respondent] in her medical skills was correct."

The Court further held:

"Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact-finding proceedings to which we have traditionally attached a full hearing requirement . . . ."

An early leading case is *Connelly v. University of Vermont*, 244 F.Supp. 156 (DC Vt. 1965) where a medical student challenged his dismissal from medical school. He had failed the pediatrics-obstetrics course and was terminated under a College of medicine rule because he failed 25 percent or more of his major third year courses. The court described the role of the court in such cases as follows:

The effect of these decisions is to give school authorities absolute discretion in determining whether a student has been delinquent in his studies, and to place the burden on the student of showing that his dismissal was motivated by arbitrariness, capriciousness or bad faith. The reason for this rule is that in matters of scholarship, the school authorities are uniquely qualified by training and experience to judge the qualifications of a student and efficiency of instruction depends in no small degree upon the school faculty's freedom from interference from other noneducational tribunals. It is only when school authorities abuse this discretion that a court may interfere with their decision to dismiss a student.

The rule of judicial nonintervention in scholastic affairs is particularly applicable in the case of a medical school. A medical school must be the judge of the qualifications of its students to be granted a degree; Courts are not supposed to be learned in medicine and are not qualified to pass opinion as to the attainments of a student in medicine.

Whether the plaintiff should or should not have received a passing grade for the period in question is a matter wholly within the jurisdiction of the school authorities, who alone are qualified to make such a determination.

B) ACADEMIC

In suits involving academic dismissals, courts have shown a real reluctance to review the dismissal, instead, showing great deference to these decisions given the need to protect professional autonomy and scholarly integrity.

1) But see: *In the Matter of Eugene Chusid v. Albany Medical College of Union University, 157 AD 2d* 1019 (1990), "... while courts are reluctant to intervene in controversies involving academic standards, such matters are subject to judicial scrutiny to determine whether an institution acted in good faith or its action was arbitrary or irrational. As rarely as judicial review has been used to upset an academic determination a "school's academic evaluation of a student is not completely immune from judicial scrutiny."

2) See: *Connelly* as follows:

"Where a medical student has been dismissed for a failure to attain a proper standard of scholarship, two questions may be involved: the first is, was the student in fact delinquent in his studies or unfit for the practice of medicine? The second question is, were the school authorities motivated by malice or bad faith in dismissing the student, or did they act arbitrarily or capriciously? In general, the first question is not a matter for judicial review. However, a student dismissal motivated by bad faith, arbitrariness or capriciousness may be actionable.

3) See: Similarly, the principle underlying *Connelly* was reaffirmed in *Gaspar,* a case concerning a practical nursing student who had been dismissed for deficient performance in a clinical training program.

> "The courts are not equipped to review academic records based upon academic standards within the particular knowledge, experience and expertise of academicians. Thus, when presented with a challenge [on those grounds], the court may grant relief, as a practical matter, only in those cases where the student presents positive evidence of ill will or bad motive."

4) Subjective -- Clinical Skills, Interpersonal Skills

A school's faculty establishes and maintains academic standards for student performance and is regarded as being uniquely qualified to observe and judge all aspects of student academic performance, including demonstrated knowledge, technical and interpersonal skills, attitudes and professional character. Problems often arise when attempting to evaluate the subjective aspects of academic performance, such as: clinical abilities, interpersonal skills and personal and professional characteristics. Evaluations of noncognitive skills, which are often highly dependent on subjective opinions and are limited in the opportunities to observe those skills, often give rise to the greatest number of problems.

## B) DISCIPLINARY

In suits alleging disciplinary dismissals, courts have shown a greater willingness to review the dismissal because these questions often involve issues of fact and do not require any academic expertise. These standards often exceed the "informal give-and-take" that has developed in the academic context.

If the cases makes it to court, the medical school will bear the burden of proof to show that the student received procedural due process and that the penalty was justified.

1) See: *Estban v Central Missouri State College*, where the court enunciated the three minimal requirements for cases involving disciplinary action:

> "First, the student should be given adequate notice in writing of the specific ground or grounds and the nature of the evidence on which the disciplinary proceedings are based. Second, the student should be given an opportunity for a hearing in which the disciplinary authority provides a fair opportunity for hearing of the student's position, explanations and evidence. The third requirement is that no disciplinary action be taken on grounds which are not supported by any substantial evidence."

## DISCRIMINATION CLAIMS

***Case Example: Student W: admitted under special minority admission program but was dropped from the rolls of the school after repeated failures. Complainant, a black male, alleged he received a failing grade in junior pediatrics and surgery, even though he had performed well enough to pass. He had failed three courses in second year but was allowed to repeat those classes the next year as a special student. Because he failed two junior clerkships, he was dismissed from the school. He argued that the school had not treated non-black students in this manner and believed that race was the reason for the disparate treatment.***

A. How to respond to allegations of discriminatory intent.

1) Proof of Discriminatory Intent: The alleged victim must show that he:

a) is a member of a protected class; and

b) was deprived of something (i.e. denied admission).

2) The burden moves to the institution to articulate a "legitimate, nondiscriminatory reason" for depriving the victim of the contested benefit.

a) In the case example, there was no evidence in the record of any student having failed three courses in his second year and two in his third and still being allowed to continue in medical school. The school was able to show the student had been treated like other students in being able to retake failed classes and enrolling as special student. The school's rules clearly allowed for dismissal of any student with two or more failures.

3) Plaintiff's Proof of Pretext: Once the institution has proffered a legitimate, nondiscriminatory reason for the action challenged, it is up to the plaintiff to refute that reason by presenting proof of "pretext" -- proof designed to convince the court that the reason advanced is not worthy of credence and is merely "pretext" designed to disguise discriminatory animus.

   a) See: *Wolsky v. Medical College of Hampton Roads*, C.A. 4 (Va.), 1 F.3d 222 (1993), where a former medical student, claiming handicapped status and protection under Section 504 of the Rehabilitation Act, filed suit against medical school alleging discrimination in his dismissal and subsequent denials of his readmission. The case was ultimately decided on a statute of limitations issue and the alleged violations of the Rehabilitation Act were not reached.

   b) See: *Rothman v. Emory University, (N.* D. Ill.), 828 F.Supp. 2, (1993), where a former law student sued the University for violations of the American With Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act. The ADA claim was dismissed because the alleged violations occurred prior to its effective date. (The ADA was passed in 1990 but not made effective until January 26, 1992.) However, the Rehabilitation claims of disparate impact were allowed to stand and were returned for further review.

## IV. TREATMENT OF RESIDENTS VERSUS UNDERGRADUATE MEDICAL STUDENTS

Residents are unique in the world of medical education as they straddle the line between students and employees. Graduate medical education is organized by specialty under the sponsorship of hospitals, medical schools, medical centers or other institutions in a hybrid educational and working atmosphere. As students progress into residency, it is more difficult to identify, help or remove the student with recurrent problems. Medical schools are at a pivotal point to identify problems, provide educational rehabilitation or remove individuals not fit to practice medicine. As a protection for all parties involved, resident review committees should not be hesitant to act early in identifying struggling residents who may not be suited for a career in medicine.

If a resident is threatened with dismissal, the resident should receive:

1) notice of deficiencies and the consequences if they are not remediated;

2) an opportunity to review the evaluations; and

3) an opportunity to respond. The resident should be able to present his or her view of the situation to the decision-makers, either in writing or in person.

Courts will not overturn academic dismissal decisions that are based upon the faculty's exercise of honest professional judgment, based on a resident's entire record and which adhere to procedural guidelines. Courts have held that "a person who seeks an academic credential and who is on notice that satisfactory performance is a prerequisite to his or her receipt of that credential consents to frank evaluation by those charged with the responsibility to supervise him."

1) See: *(Streeten v. Wadsworth Veterans Hospital,* 537 F2d 361 (9th Cir. 1976)-- a resident in a pathology program received an appointment for what the letter stated was for "the duration of this training unless sooner terminated and ... subject to periodic review by resident review board." Three months before the end of his first year, he was informed in writing that his contract would not be renewed. It was the first time in 20 years that the program had formally terminated a resident before the end of his training program. The resident sued, claiming that he was entitled to notice and a trial-type hearing prior to his dismissal.

   The US Court of Appeals held:

   "The ultimate decision-maker must have wide discretion in considering the evidence against the resident. It is bound, however, not to act in bad faith or arbitrarily or capriciously. The resident's interest is important enough that he should have notice of his deficiencies, should have an opportunity to examine the evidence against him, and should be allowed to present his side of the story to the decision-maker ..."

2) See: *Easaw v. St. Barnabas Hospital,* 142 Misc. 2d 408 (1989), a second-year medical resident was terminated from the residency program because of absenteeism. Although found not to be entitled to a preliminary injunction requiring reinstatement, the court did find plaintiff was denied the procedural due process to which he was entitled as a hybrid graduate student doctor and hospital staff employee dismissed for disciplinary, rather than academic reasons.

3) See: **[need cite from article]** In case of a resident who was dismissed for being excessively abrasive, one court recognized another important noncognitive factor -- harmony in interpersonal relationships.

"A hospital staff is highly interdependent, both in the sense that one doctor depends upon the professional skill of other doctors and in the sense that the collegial nature of the body makes tolerable working relationships an absolute prerequisite to effective staff performance ... The collective opinion that a resident is excessively abrasive would destroy the proper operation of a collegial functionally integrated group.

4) see: **[include discussion of Ezakwo v. NYC Health & Hospitals Corporation]**, 940 F.2d 775 (1991) - resident denied chief residency despite being promised it in promotional materials.

## V. CONCLUSION

# VI. ADDITIONAL RESOURCES

# ADDITIONAL RESOURCES

## Court Decisions

*Tynecki v. Tufts University School of Dental Medicine*, 875 F. Supp. 26 (D. Mass 1994).

*Wisden v. Dixie College Parking Committee*, 935 P. 2d 550 (March 20, 1997).

## Journal Articles and Commentaries

"Protecting the Student: A Critique of the Procedural Protection Afforded to American and English Students in University Disciplinary Hearings" by Walter Saurack, Vol. 21, Number 4, *Journal of College and University Law*, Spring 1995.

"The *Vaksman* Approach to Academic Dismissals: A Different Beat to the Same Drum" by Anthony K. Finaldi, *Journal of Law and Education*, Vol. 24, Number 3, Summer 1995.

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"Academic Abstention Stronger Than Ever Despite *Vaksman*" by Steven G. Olswang, *Journal of Law and Education*, Vol. 26, Number 1, January 1997.

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"Efforts to Curb Grade Inflation Get An F From Many Critics" by Ben Gose, *The Chronicle of Higher Education*, Vol. XLIII, Number 46, July 25, 1997 at A41.

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